76-1334

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Misc. No. _____

HENRY COWAN, SUPERINTENDENT
KENTUCKY STATE PENITENTIARY ... PETITIONER

V.

PAUL LEWIS HAYES ..... RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Henry Cowan, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit decided December 30, 1976.

OPINION BELOW

The judgment and order of the United States Court of Appeals for the Sixth Circuit in this case is reported as *Hayes* v. *Cowan* 547 F.2d 42 (6th Cir. 1976). The opinion and order are set out in full in the Appendix, 1a-8a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on December 30, 1976. This petition for a writ of certiorari was filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER THE COMMONWEALTH'S ATTORNEY IS PROHIBITED FROM BARGAINING FOR A PLEA OF GUILTY BY THREATENING TO BRING AN ADDITIONAL INDICTMENT IF AN ACCUSED DOES NOT ACCEPT A PLEA BARGAIN OFFER.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the Fifth, Sixth and Fourteenth Amendments.

STATEMENT OF THE FACTS AND OF THE CASE

The facts which led to Paul Lewis Hayes' conviction and incarceration are not disputed. Hayes, respondent herein, was indicted by the Fayette County Grand Jury, Lexington, Kentucky, on January 8, 1973, for the charge of uttering a forged instrument under Kentucky Revised Statute (KRS) 434.130. After arraignment, pretrial conferences were held with the Commonwealth's attorney on January 24 and 26, 1973. During these conferences the prosecutor offered to recommend a five-year sentence if Hayes would plead guilty to uttering a forged instrument. Conviction for uttering a forged instrument

carried a penalty of from two to ten years in prison. Hayes was told that if he did not plead guilty, he would be charged under the then Kentucky Habitual Criminal Act, KRS 431.190. Hayes chose not to plead guilty in the face of a strong case against him.

The prosecutor thereupon returned to the grand jury on January 29, 1973, and obtained an indictment charging Hayes under the Habitual Criminal Act.

A bifurcated trial was held in the Fayette Circuit Court, Lexington, Fayette County, Kentucky, on April 19-20, 1973, and a conviction was returned on both the principal charge and as an habitual criminal. As required by the habitual criminal statute where conviction is had on the principal charge and of having twice before been convicted of felonies, Hayes was sentenced to life in the penitentiary.

At the beginning of the second phase of the trial for consideration under the habitual criminal indictment, Hayes on his own objected to the manner in which he had been indicted on the habitual criminal charge. The facts concerning this matter were admitted by the prosecutor during his cross-examination of Hayes at the trial. The prosecutor said:

> "[I]sn't it a fact that I told you if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?"

See Appendix, 3b. Hayes' refusal to plead guilty clearly

lead to his indictment under the habitual criminal statute.

The issue involved in this petition for certiorari of whether the Commonwealth's attorney, as the representative of the state, is prohibited from bargaining for a plea of guilty by threatening to bring an additional indictment if an accused does not accept a plea bargain offer, was raised on direct appeal by Hayes to the Kentucky Court of Appeals, the then highest appellate court in the Commonwealth. Hayes argued that his Fifth, Sixth and Fourteenth Amendment rights were abridged by the prosecutor's action in bringing the habitual criminal charge. The Kentucky Court of Appeals affirmed Hayes' conviction on March 1, 1974, in an unreported memorandum opinion saying Hayes had risked the maximum sentence of life imprisonment for a sentence of five years and that he "cannot now complain of his bad bargain." See Appendix, 4c.

A Petition for a Writ of Habeas Corpus was filed on June 11, 1975, in the United States District Court for the Eastern District of Kentucky. A Magistrate's Report and Recommendation was also filed on June 11, 1975, wherein the opinion was that the petition was "patently without merit." See Appendix, 2d.

On September 9, 1975, Judge Bernard T. Moynahan, Jr., entered an order adopting the Magistrate's Report and Recommendation and thereby denied the Petition for Writ of Habeas Corpus. See Appendix, 1e.

After an Application for Certificate of Probable Cause was filed in the United States District Court on

October 9, 1975, Judge Moynahan entered an order on December 19, 1975, declining to issue a Certificate of Probable Cause and specifically finding that the appeal sought was frivolous, not taken in good faith, and not presenting a substantial question. See Appendix, 3f.

An appeal was taken to the Sixth Circuit Court of Appeals. In an opinion rendered December 30, 1976, the Sixth Circuit held that the Commonwealth had violated Hayes' due process rights by placing him in fear of retaliatory action for insisting on his constitutional rights to stand trial before a jury. It is from this order of the United States Court of Appeals for the Sixth Circuit that a review is sought.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit has decided an important constitutional question presented by this case which has not been but should be decided by this Court.

The Sixth Circuit's decision severely erodes the role of plea bargaining in the administration of criminal justice. The Sixth Circuit's decision has instructed how prosecutors may constitutionally use their plea bargaining leverage. The position of the Sixth Circuit is that a prosecutor may not seek an additional indictment, specifically under an enhancement statute, if an accused chooses to stand trial rather than plead guilty to an offer made by the prosecutor on the original charge. This Court should note that this decision has no parallel by any other federal court and that it is in direct conflict with the opinion of the United States District Judge involved with

this case as well as being in direct conflict with the decision of the Kentucky Court of Appeals.

The petitioner submits that the prosecutor's action found to be constitutionally impermissible by the Sixth Circuit Court of Appeals is no more vindictive than is any other aspect of the plea bargaining process and that the leverage which may be applied by a prosecutor in question in this case does not impose any unconstitutional penalty for the assertion of rights by one accused of a felony.

The state to some degree acts in a coercive and vindictive manner at every important step in the criminal process. Apprehending and charging an individual are both threatening acts by the state. *Brady* v. *United States*, 397 U.S. 742, 757 (1970). Plea bargaining which usually follows being charged with crime is threatening, too. By its very nature plea bargaining serves to grant certain concessions to an accused in the event a guilty plea is entered. A prosecutor may agree to recommend a particular sentence, to drop counts, to permit a plea to a lesser included offense, or to drop an enhancement provision in the indictment. Plea bargaining is a vehicle of the prosepective branch of the criminal justice system and it is the prosecutor, not the accused, who is in control. The risks involved in plea bargaining rests, however, exclusively upon the accused. If the bargain offered by a prosecutor is not accepted, an accused must face the risks of a harsher penalty upon conviction. Definitely the plea bargaining process discourages assertion of the Fifth Amendment right not to plead guilty, and to

deter exercise of the Sixth Amendment right to demand a jury trial. Having to decide whether to compromise these valuable constitutional rights has a considerable coercive impact.

Nevertheless, this Court has unequivocally given its approval to the process of plea bargaining. In *Brady*, supra, at 752, this Court stated that plea bargaining helps conserve judicial and prosecutorial resources in cases in which there is no substantial issue as to the defendant's guilt. The Sixth Circuit Court of Appeals recognized on the present case that this Court has indicated that there are limits to the tactics that a prosecutor may use in bargaining with defendants and cites *Santobello* v. *New York*, 404 U.S. 257 (1971). The Sixth Circuit stated it was clear "that the legitimate purposes of plea bargaining are not served if a prosecutor abuses his powers in order to coerce an unwilling defendant into foregoing his constitutional right to trial." Appendix, 4a.

The Sixth Circuit opinion is based substantially upon holdings by this Court that defendants who assert procedural rights must be treated in a way that avoids any suggestion of vindictive or retaliatory motive. In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), this Court considered the constitutional problems presented wherein after a successful appeal and reconviction, the defendant was sentenced to a greater punishment than he had received at the first trial.

In *Blackledge* v. *Perry*, 417 U.S. 21, 28 (1974), this Court held that when the circumstances pose a realistic

likelihood of vindictiveness, due process requires a rule analogous to that of the *Pearce* case.

The Sixth Circuit's reliance on these cases relative to the procedure in question in the present case was misplaced. This Court's holding in *Pearce* and *Blackledge* and their lower court progeny all relate to situations dealing with *other than plea bargaining*. These cases involve retaliatory actions by the court or the prosecution after an attempt to exercise procedure rights has been made by the defendant. In *Pearce*, the accused successfully challenged his first conviction on appeal. In *Blackledge*, the accused sought a trial *de novo*. In *United States* v. *Jamison*, 505 F.2d 407 (D.C. Cir. 1974), the accused had been granted a mistrial. In *United States* v. *DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975), the accused had asserted his right to change of venue. In *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (9th Cir. 1976), the accused had refused to sign a form waiving his right to be tried by a district judge. None of these cases involved the plea bargaining process as existed in the present case. Yet their holdings are cited in support of the Sixth Circuit's decision striking down the plea bargaining procedure used by the Commonwealth's prosecutor in this case. Petitioner submits that the Sixth Circuit's decision in this case illogically applied the salutary *Pearce* principle, even as extended to prosecutorial conduct in *Blackledge*, to a situation far removed from the problem for which the principle was designed.

The question in this case should be whether the effects of the procedure used by the prosecutor impose an impermissible burden upon the exercise of any right of

the accused. The prosecutor did not threaten physical harm, nor threaten prosecution on a charge not justified by the evidence, either of which would be impermissible. See *Brady*, supra, at 757 and 758 f.n. 8. What the prosecutor did in the present case was to create natural coercive impact upon the accused through the plea bargaining process with a promise of leniency for a plea of guilty. At that point Hayes was faced with the Hobson's choice of compromising valuable constitutional rights out of the fear of greater punishment. The prosecutor offered Hayes five years on a charge that carried a possible ten years in the penitentiary. The prosecutor had foregone obtaining the habitual criminal charge against Hayes but made it clear to him that he could go back to the grand jury and have him indicted under the habitual criminal statute because of his two prior existing felony convictions. Hayes' gamble in this process was simply that he could escape conviction on the charge of uttering a forged instrument. When he chose not to plead guilty, the prosecutor upped the ante to pot limit by obtaining the habitual criminal indictment.

The end result of the procedure used by the prosecutor in this case was no more vindictive so as to impose an impermissible burden upon the assertion of any right than is the frequent situation where a prosecutor indicts on a principal charge and also under the habitual criminal statute and then bargains for a plea of guilty to the principal charge on the promise the prosecutor will make a motion to drop the habitual criminal charge. The difference between the leverage and coercive impact involved in the present case and that in the procedure noted

above is nonexistent. The constitutional rights to be compromised are the same and the stakes for going to trial are the same. The prosecutor is in both situations exercising the same range of options available for leverage to obtain a guilty plea so as to avoid going to trial. On the one hand, the prosecutor, who has the discretion whether to indict on the habitual criminal charge, seeks an indictment on a principal charge plus the habitual criminal charge and then seeks a plea of guilty and in return will drop the habitual criminal charge. On the other hand, the prosecutor indicts on a principal charge and attempts to obtain a guilty plea, holding in reserve the possibility of returning to the grand jury for indictment under the habitual criminal statute if no guilty plea is obtained. The Sixth Circuit's decision finds in this case that one way of arriving at the same stakes is vindictively motivated while the other way of arriving at the same point is an accepted practice in the useful process of plea bargaining. The burden upon Hayes during the plea bargaining procedure used in this case should be found to be not unconstitutionally impermissible.

We believe further that it is inescapably necessary to consider this case from the perspective of what the very definite controlling law would be on the situation if Hayes would have chosen to plead guilty and have taken the five years on the uttering charge rather than having risked facing the habitual criminal charge and the possibility upon conviction of receiving life imprisonment. Clearly such a possibility as this, which could have resulted from the very practice proscribed by the Sixth Circuit, would be found to be constitutionally permissible. A plea of

guilty motivated by a desire to avoid harsher punishment has been found to be not involuntary if it is a well-considered, prudent choice of the lesser of two evils. *Brady*, supra, and its companion cases, *McMann* v. *Richardson*, 397 U.S. 759 (1970), and *Parker* v. *North Carolina*, 397 U.S. 790 (1970). The Kentucky Court of Appeals, citing the *Brady* case, has stated that mental pressure placed on a defendant, charged with serious crime, in being forced to choose between accepting conviction of a less serious offense, upon a plea of guilty, or instead, standing trial under the habitual criminal statute was not such that the defendant was disabled from constitutionally waiving his right to trial by jury. *Padgett* v. *Commonwealth*, Ky., 493 S.W.2d 710 (1973).

For the foregoing reasons, if the decision of the Sixth Circuit in the present case is allowed to stand, the role of plea bargaining as an effective tool in the administration of criminal justice will have been significantly diminished.

CONCLUSION

Petitioner submits that it is necessary for this Court to review the decision of the Sixth Circuit which gave a chilling construction to plea bargaining and took away an important part of the prosecutor's bargaining leverage.

Respectfully submitted,

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PROOF OF SERVICE

I, Robert L. Chenoweth, one of counsel for the petitioner, hereby certify that three (3) copies of the foregoing brief were mailed, postage prepaid, to Honorable J. Vincent Aprile, II, Assistant Deputy Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601, this March 25, 1977.

Robert L. Chenoweth

Robert L. Chenoweth
Assistant Attorney General
Commonwealth of Kentucky

APPENDIX

No. 76-1409

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL LEWIS HAYES,
Petitioner-Appellant,

v.

HENRY COWAN, Warden,
Respondent-Appellee.

APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed December 30, 1976.

Before: PECK, McCREE, and LIVELY, Circuit Judges.

McCREE, Circuit Judge. This is an appeal from the denial of a petition for habeas corpus challenging confinement based on Hayes' conviction of being an habitual criminal under Kentucky's recidivist statute, K.R.S. §431.190.[1] The district court referred the petition to a magi-

[1]At the time of appellant's conviction the statute provided:

> Conviction of felony; punishment on second and third offenses. Any person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.

It has since been repealed. According to §532.080, which now

strate to determine whether leave to proceed *in forma pauperis* should be granted pursuant to 28 U.S.C. §1915 (a). Although the magistrate ordered the petition filed and determined that petitioner's claims were not so frivolous that *in forma pauperis* leave should not be granted, nevertheless, he concluded that the contentions made were "patently without merit" and recommended that the petition be dismissed. The district court adopted the magistrate's conclusions and, instead of issuing an order to the respondent to show cause as provided in 28 U.S.C. §2243, it dismissed the petition on the grounds that the mandatory life sentence imposed for the habitual criminal conviction did not constitute cruel and unusual punishment, that petitioner had not been arbitrarily selected for prosecution as an habitual criminal, and that the state prosecutor's decision to seek an habitual criminal indictment when petitioner refused to plead guilty to the charge of forgery in return for a recommendation of a five-year sentence was not an unconstitutional implementation of plea bargaining.

We issued a certificate of probable cause to permit an appeal when the district court, determining that an

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regulates "persistent felony offender sentencing," the special sentence may be imposed only if, for each of two previous felony convictions, the sentence was at least one year; defendant was imprisoned under each such sentence before commission of the instant felony; and the offender was over eighteen years of age at the time he committed each offense. Petitioner would not have been subjected to enhanced sentencing under §532.080, because none of hese conditions were satisfied.

appeal would be frivolous and not taken in good faith, declined to do so. Because we conclude that petitioner was denied the due process of law by the prosecutor's tactics, we reverse.

The facts which led to petitioner's conviction and incarceration are not disputed.[2] On January 8, 1973, he was indicted for forgery of a check in the amount of $88.30 by a Fayette County, Kentucky grand jury. After arraignment, a pretrial conference was held with the state prosecutor. During this conference, the prosecutor offered to recommend a five-year sentence if Hayes would plead guilty. Petitioner was warned that if he did not plead guilty, he would be charged under the habitual criminal statute. He refused to plead guilty, but insisted on receiving a full trial. The prosecutor thereupon returned to the grand jury, and, on January 29, 1973, obtained a new indictment charging petitioner under the habitual criminal statute based upon the forgery as a third offense. Petitioner was convicted by a jury, and on the instructions of the judge, the mandatory life sentence for a third offense habitual criminal was imposed.[3]

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[2]These facts were admitted by the prosecutor during his cross-examination of appellant at the sentencing trial:

> . . . isn't it a fact that I told you if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?

[3]We expressed our disapproval of such practices in Cunning-

We recognize that plea bargaining now plays an important role in our criminal justice system. In *United States* v. *Brady*, 397 U.S. 742, 752 (1970), the Supreme Court approved the practice, and stated that plea bargaining helps to conserve judicial and prosecutorial resources in cases in which there is no substantial issue about the defendant's guilt. The Court has recognized, however, however, that there are limits to the tactics that a prosecutor may use in bargaining with defendants. See *Santobello* v. *New York*, 404 U.S. 257 (1971). The Court has not yet had an opportunity to explore fully these limits, particularly in cases such as this, "where the prosecutor . . . deliberately employed[ed his] charging . . . powers to induce a particular defendant to tender a plea of guilty." *Brady, supra*, at 751 n.8. But it is clear that the legitimate purposes of plea bargaining are not served if a prosecutor abuses his powers in order to coerce an unwilling defendant into foregoing his constitutional right to trial.

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ham v. Wingo, 443 F.2d 195, 198 n.1 (1971). In that case we noted the findings of the President's Commission of Law Enforcement and Adminstration of Justice in **The Challenge of Crime in a Free Society** (1967):

> "At the same time the negotiated plea of guilty can be subject to serious abuses. In hard-pressed courts, where judges and prosecutors are unable to deal effectively with all cases presented to them, dangerous offenders may be able manipulate the system to obtain unjustifiably lenient treatment. There are also real dangers that excessive rewards will be offered to induce pleas or that prosecutors will threaten to seek a harsh sentence if the defendant does not plead guilty. Such practices place unacceptable burdens not the defendant who legitimately insists upon his right to trial. • • •" (Emphasis supplied.)

The Supreme Court has held that defendants who assert procedural rights must be treated in a way that avoids any suggestion of vindictive or retaliatory motive. In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Court held that a defendant may not be subjected to a more severe penalty on retrial after a successful collateral attack against a conviction. The Court reasoned that due process requires that a defendant be free from fear of retaliatory action when he asserts procedural rights. Therefore a defendant may not be dealt with more harshly on retrial unless the permissible reasons therefor affirmatively appear.

In *Blackledge* v. *Perry*, 417 U.S. 21 (1974), the Court applied the rule expressed in *Pearce* to protect defendants from the vindictive exercise of a prosecutor's discretion. In that case, a defendant in a misdemeanor prosecution had asserted his right to a trial de novo on appeal. Before the new trial, the prosecutor obtained a felony indictment against the defendant. The Court held that this tactic, if allowed would deter defendants from asserting their procedural rights. The Court emphasied that the prosecution should not be allowed to behave in a manner that even suggests a retaliatory motive.

The concerns expressed in *Blackledge* have persuaded several lower courts to limit the prosecutor's discretion in

related situations. In *United States* v. *Jamison*, 505 F.2d 407 (D.C. Cir. 1974), the court reversed a conviction of first degree murder obtained after the defendants had been granted a mistrial during an earlier trial based on an indictment for second degree murder. In *United States* v. *DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975), the court refused to allow prosecution of an indictment obtained after a defendant had asserted his right to a change of venue of a trial on an indictment charging less serious offenses. In *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (9th Cir. 1976), the court held that a defendant cannot be tried on a felony indictment after he has refused to plead guilty to a misdemeanor, if no justification of the increase in severity of the charges is offered. See also *United States* v. *Gerard*, 491 F.2d 1300 (9th Cir. 1974); *United States* v. *Butler*, 515 F. Supp. 394 (D. Conn. 1976); *Sefchek* v. *Brewer*, 301 F. Supp. 793 (D. Iowa 1969).

We hold that a similar potential for impermissible vindictiveness exists when a prosecutor is allowed to bring an habitual offender indictment against a defendant who has refused to plead guilty to an indictment for the same unenhanced substantive offense. In this case the prosecutor does not assert that any event occurred between the issuance of the first indictment and the issuance of the second to influence his decision except petitioner's insistence upon his right to trial. There is no indication that the prosecutor, had he thought such an indictment

proper, could not have included the habitual criminal charges in the original indictment.

The Commonwealth urges that the entire concept of plea bargaining will be destroyed if prosecutors are not allowed to seek convictions on more serious charges if defendants refuse to plead guilty. We do not agree. Although a prosecutor may in the course of plea negotiations offer a defendant concessions relating to prosecution under an existing indictment, see *United States ex rel. William* v. *McMann*, 436 F.2d 103 (2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971), he may not threaten a defendant with the consequence that more severe charges may be brought if he insists on going to trial. When a prosecutor obtains an indictment less severe than the facts known to him at the time might permit, he makes a discretionary determination that the interests of the state are served by not seeking more serious charges. Cf. *United States* v. *Johnson*, 537 F.2d 1170 (4th Cir. 1976). Accordingly, if after plea negotiations fail, he then procures an indictment charging a more serious crime, a strong inference is created that the only reason for the more serious charges is vindictiveness. Under these circumstances, the prosecutor should be required to justify his action. In this case, a vindictive motive need not be inferred. The prosecutor has admitted it.

Therefore we hold that due process has been offended by placing petitioner in fear of retaliatory action for insisting upon his constitutional right to stand trial. Accordingly, the dismissal of the petition is reversed and

the case is remanded with instructions to order petitioner's discharge except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument.

* * * * * * *

A. No.

X10 All right, what is cop-out court, if that is not right?

A. Cop-out to me is that . . . uh . . . you offered me a five-year plea and you told me if I didn't take five years that you would indict me on the habitual criminal. That is what you done.

X11 All right, was the Judge there?

A. No.

X12 Was the jury there?

A. No.

X13 Was your lawyer there?

A. That's right, yes.

X14 And, I was there?

A. Yes.

X15 And, I made these statements to you all both in the presence of both of you, didn't I?

A. No.

X16 I didn't talk to you privately, did I?

A. No.

X17 Your lawyer, Mr. Wake, was there during the entire time, wasn't he?

A. That's right.

X18 And, then, I left you and Mr. Wake alone to discuss it by yourself -- by yourselves in a room by yourselves?

A. No, no, no.

X19 You and Mr. Wake did not discuss this matter by yourselves in a room and I left and, then, later I came back and asked what you wanted to do?

A. No, you walked out of the room and you threatened me with the habitual criminal, you know, and --

X20 And, then I walked out of the room, didn't I?

A. You walked out of the room.

X21 And, I told you that the law was that there was a habitual criminal act that I had to place against you?

A. No, you did not tell me that; you told me that you was indicting me on the "hibitch" if I didn't take the five-year plea. That is what you told me.

X22 Isn't it a fact that I told you at that time if you did not intend to plead guilty to five years for this charge and that they had caught you inside and that your accomplice had made a statement against you -- isn't it a fact that I told you at that time that if

you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?

A. No.

X23 I did not tell you that I was going to return to the grand jury?

A. No.

X24 I told you out of my own --

A. You told me that you was going to indict me -- you told me you was going to indict me on the habitual criminal and you called me back over here the following week on a Friday and I . . . answered the indictment on the habitual criminal. That was it. That was all that you told me.

X25 You were arraigned on that charge that the grand jury had brought against you, weren't you?

A. On the "hibitch.."

X26 And, you were asked how you pled to the charge, weren't you?

A. Yes.

X27 And, at that time, you had a lawyer present too, didn't you?

A. Yes.

X28 In fact, you have had a lawyer throughout these proceedings, haven't you?

A. Sure, yeh.

X29 Now, when you first went to the Reformatory in 1962, you were eighteen years old, is that right?

A. Right.

X30 And, at that time, did you learn what the habitual criminal was?

A Yeh, I learned that, yeh.

X31 What is the name that the people have at the penitentiary for the habitual criminal?

A. The "hibitch."

RENDERED: MARCH 1, 1974

COURT OF APPEALS OF KENTUCKY
FILE NO. 73-766

PAUL LEWIS HAYES ..... APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES PARK, JR., JUDGE
INDICTMENT NOS. 73-C-26, 73-C-29

COMMONWEALTH OF KENTUCKY ..... APPELLEE

MEMORANDUM OPINION OF THE COURT BY JUSTICE JONES

AFFIRMING
(Not to be cited as authority)

Paul Lewis Hayes was convicted in the Fayette Circuit Court on a two-count indictment, charging him in Count No. 1 with the principal offense of uttering a forged instrument, under KRS 434.130, and in Count No. 2 of having been convicted of two prior felonies, under KRS 431.190. The trial court first tried Hayes on the principal offense of uttering a forgery, and then he was tried under the habitual criminal statute.. The jury found him guilty on both counts and fixed his punishment at confinement in the state penitentiary for life. Upon this appeal, Hayes contends: (1) the trial court erred in failing to direct a verdict in his behalf, he contending that the evidence was insufficient to support the conviction;

(2) the trial court erred in failing to instruct the jury as to the requirement of corroboration of the testimony of an accomplice; (3) he was denied due process and equal protection of the law by the habitual criminal conviction because the mandatory life sentence required by the statute is cruel and unusual punishment.

We have examined the evidence, and we are convinced that it establishes that appellant participated in the crimes with which he is charged. The Commonwealth proved that appellant presented a check to the Pic Pac grocery; that the check presented was stolen from Brown Machine Works; and that the check did not bear an authorized signature. Thus there was an inference that Hayes either had forged the unauthorized signature or knew it to have been forged. It was incumbent on him to satisfactorily explain the uttering or the forgery.

In *Smith* v. *Commonwealth*, Ky., 307 S.W.2d 201, 1957), we stated:

> "When the evidence shows the name attached to the instrument has been forged, the inference arises that the person who uttered it as genuine either forged the instrument or knew it to be forged, and unless the uttering or forgery is explained satisfactorily, the presumption becomes conclusive." *Smith* v. *Commonwealth*, supra, 203.

Appellant's next contention, that the trial court should have given an instruction as to the requirement of corroboration of an accomplice's testimony, is wholly without merit. Appellant failed to object to the instructions in the trial court. The failure constituted a valid

waiver so as to preclude Hayes from securing a reversal of his conviction upon the basis of any alleged error therein. RCr 9.54(2); *Johnson* v. *Commonwealth*, Ky., 477 S.W.2d 159 (1972); *Alsip* v. *Commonwealth*, Ky., 482 S.W.2d 571 (1972).

Hayes next argues that his constitutional rights were abridged by the habitual criminal charge and by his subsequent conviction thereunder. He complains of the leverage available to the Commonwealth's Attorney in deciding whether or not to have an accused indicted under the Habitual Criminal Act, KRS 431.190.

In a pre-trial conference in this case, the Commonwealth's Attorney offered to recommend a five-year sentence if Hayes would plead guilty to the charge of uttering a forgery. This he refused to do although he was advised by the prosecutor that the case would be resubmitted to the grand jury for a new indictment under the Habitual Criminal Act. Based upon our holding in *Cunningham* v. *Commonwealth*, Ky., 447 S.W.2d 81 (1969), we conclude that it was not error for the Commonwealth's Attorney to resubmit the case to the grand jury. We have said:

> "Assuming, however, that the Commonwealth's Attorney was still in a position, in the event Cunningham had then chosen to plead not guilty, to resubmit the cases to the grand jury and ask for new indictments under the Habitual Criminal Act, we are of the opinion nevertheless that this is not the kind of pressure that could be held to affect the voluntariness of a guilty plea. A person charged with a cri-

minal offense always is under the pressure of risking a maximum sentence at the hands of the jury or the court if he does not accede to what the Commonwealth is willing to recommend. The more serious the offense, the greater is the pressure, and it is even more so when the Commonwealth has a strong case. To say that the attorney for the Commonwealth could not use these advantages in discussing the terms and prospects of settlement on the basis of a guilty plea would mean simply that there could be no such settlements. We are unwilling to accept that result." *Cunningham* v. *Commonwealth*, supra 83.

Here Hayes risked the maximum sentence of life imprisonment for a sentence of five years. He cannot now complain of his bad bargain.

Finally Hayes argues that a mandatory life sentence under the Habitual Criminal Act in his case is too severe a penalty, constituting cruel and unusual punishment. In light of the previous felonies of which he had been convicted, viz., detaining a female against her will (a lesser included offense of rape), and robbery, we think the punishment is not too harsh. We have held the Habitual Criminal Act, KRS 431.190, to be constitutional. *Barber* v. *Thomas*, Ky., 355 S.W.2d 682 (1962).

The punishment authorized by the statute was not wrongly or disproportionately applied to the appellant. Accordingly, the judgment is affirmed.

All concur.

ATTORNEYS FOR APPELLANT:

Anthony M. Wilhoit
Paul F. Isaacs
Office of Public Defender
625 Leawood Drive
Frankfort, Kentucky 40601

ATTORNEYS FOR APPELLEE:

Ed W. Hancock
Attorney General

Robert L. Chenoweth
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

FILED JUNE 11, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL LEWIS HAYES ..... **PETITIONER**

VS. **MAGISTRATE'S REPORT AND RECOMMENDATION**
NO. 75-61

HENRY COWAN, Warden, Etc. ..... **RESPONDENT**

• • • • •

The petitioner, alleging that he is incarcerated in the State Penitentiary at Eddyville, has tendered for filing a petition for writ of habeas corpus. He has filed therewith a motion for leave to proceed *in forma pauperis*, which motion is supported by an affidavit of poverty. In accordance with 28 U.S.C. §636(b), and pursuant to a General Order of this Court, the aforesaid documents have been referred to the undersigned Magistrate for preliminary review.

In his tendered pleading the petitioner alleges that his confinement is the result of his convictions, following a bifurcated trial, of the offenses of forgery and of being a habitual criminal. He contends that his conviction as a habitual criminal violates his constitutional rights in that the mandatory sentence of life imprisonment imposed upon such conviction amounts to cruel and unusual punishment in that the selective application of Kentucky's habi-

tual criminal statute causes said life sentence to amount to cruel and unusual punishment; and in that the "vindictive" application of the habitual criminal statute to the petitioner violates his right to due process of law. A copy of an opinion of the Kentucky Court of Appeals attached to the tendered petition demonstrates that the petitioner has presented substantially identical contentions to the Kentucky courts by direct appeal.

In the opinion of the Magistrate, the tendered petition is patently without merit. As held in *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962), "the constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge". Moreover, only in the deliberate presence of such factors as race, religion or other arbitrary classification will the courts review the exercise of prosecutorial selection and discretion, even when the exercise of such discretion results in different treatment of co-defendants originally charged with the same offenses in the same case. *Oyler* v. *Boles*, *supra* at page 456; *United States* v. *Bland*, 472 F.2d 1329, 1336 (D.C. Cir. 1972), cert. denied 412 U.S. 909.

There is authority for the proposition that any sentence, including a mandatory sentence of life imprisonupon conviction of being a habitual criminal, may amount to cruel and unusual punishment, if wholly disproportionate to the nature of the underlying offense and unnecessary to the achievement of any legitimate legislative purpose. *Weems* v. *United States*, 217 U.S. 349 (1910); *Hart* v. *Coiner*, 483 F.2d 136, 143 (4th Cir. 1973), cert. denied 415 U.S. 938. However, as noted by the Kentucky

Court of Appeals in the instant case, the convictions underlying the petitioner's habitual criminal conviction were detaining a female (a lesser included offense of the charge of rape), robbery and forgery. As conceded by the petitioner, the subject felonies occurred during a 12 year period beginning when the petitioner was 17 years old. One convicted of violating Kentucky's habitual criminal statute is not thereby rendered ineligible for parole, and, in the opinion of the Magistrate, it cannot be said that it is shocking, disproportionate or unnecessary to a legitimate legislative purpose to require one with a record such as that admitted by the petitioner to serve a substantial period of actual incarceration and to be subject to parole supervision for the rest of his life.

The petitioner's remaining complaints derive from the fact that not all Kentucky defendants having prior felony convictions are prosecuted under the state's habitual criminal statute and that the petitioner was so prosecuted only upon his refusal to plead guilty to the substantive offense of forgery, in return for a five year sentence. It is well settled that there is nothing unconstitutional, *per se*, in the concept of plea bargaining and that a defendant's constitutional rights are not violated by forcing him to choose between a lesser penalty, in return for the entry of a plea of guilty, as opposed to exposing himself to the risk of a greater penalty if he elects to be tried upon a plea of not guilty. *Santobello* v. *New York*, 404 U.S. 257 (1971); *North Carolina* v. *Alford*, 400 U.S. 25 (1970). If prosecutors were precluded from seeking conviction of more serious offenses following rejection by defendants of the opportunity to plead guilty to lesser

offenses, the entire concept of plea bargaining would be effectively destroyed, and, as noted previously herein, in the absence of some claim of invidious discrimination, a defendant's rights are not violated simply because a prosecutor may elect to use the leverage of an applicable habitual criminal statute against him, while not use the same leverage against other defendants.

In summary, it would appear that the petitioner's position was well stated by the Kentucky Court of Appeals in the opinion appended to the tendered petition. As noted by that Court, the petitioner risked the maximum sentence of life imprisonment for a sentence of five years. He cannot now complain of his bad bargain.

The Magistrate will this day enter an Order granting the petitioner leave to proceed *in forma pauperis* and directing that the petition for writ of habeas corpus heretofore tendered by the petitioner be filed herein. However, for those reasons discussed above, it is the Magistrate's recommendation that said petition be denied and that this action be dismissed.

This 11th day of June, 1975.

/s/ David R. Irvin

David R. Irvn, U.S. Magistrate

FILED SEPTEMBER 9, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL LEWIS HAYES ..... **PETITIONER**

VS: **ORDER** **CIVIL 75-61**

HENRY COWAN, Warden, Etc. ..... **RESPONDENT**

* * * * *

The Court having considered the entire record herein, including the Magistrate's Report and Recommendation heretofore filed herein on June 11, 1975, and being sufficiently advised;

IT IS NOW THEREFORE ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) That the Magistrate's Report and Recommendation heretofore filed herein be and the same is hereby adopted, confirmed, approved, allowed and established as and for the Court's Findings of Fact and Conclusions of Law herein .

(2) That the petitioner's Petition for Writ of Habeas Corpus be and the same is hereby denied.

(3) That this cause be and the same is hereby dismissed.

This the 9th day of September, 1975.

/s/ Bernard T. Moynahan, Jr.

Bernard T. Moynahan, Jr., Judge

Notice is hereby given of the entry of this order or judgment on September 9, 1975.

Davis T. McGarvey, Clerk
By *Josephine H. Elam*, D.C.

FILED DECEMBER 19, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL LEWIS HAYES ..... **PETITIONER**

VS: **ORDER** **CIVIL 75-61**

HENRY COWAN, SUPERINTENDENT
KENTUCKY STATE PENITENTIARY .. **RESPONDENT**

* * * * *

This petition for a Writ of Habeas Corpus is grounded on the claim of petitioner that his conviction as a habitual criminal violates his constitutional rights in that: the mandatory sentence of life imprisonment imposed upon such conviction equates to cruel and unusual punishment; the selective application of Kentucky's habitual criminal statute causes said life sentence to amount to cruel and unusual punishment; and the allegedly "vindictive" application of the habitual criminal statute to the petitioner violates his due process of law.

The claim that the mandatory life imprisonment sentence imposed upon one convicted of the Kentucky habitual criminal statute equates to cruel and unusual punishment is clearly without merit. As was well stated in *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962):

> ". . . the constitutionality of the practice of inflicting severe criminal penalties upon habitual offenders is no longer open to serious challenge".

Moreover, absent some arbitrary classification, the

courts will abjure the review of prosecutorial discretion, albeit the exercise of such discretion may result in different treatment of co-defendants originally charged with identical offenses in the same case. *Oyler* v. *Boles, supra* at page 456.

The Court observes that the convictions undorlying the petitioner's habitual criminal conviction were crimes of a most serious nature and thereby concludes that the sentence received upon conviction of being a habitual criminal was not disproportionate to the nature of the underlying offenses, and that the mandatory sentence imposed was necessary to the achievement of a legitimate legislative purpose.

Petitioner's remaining claims emanate from the fact that not all Kentucky defendants having the requisite number of prior felony convictions are prosecuted under the state's habitual criminal statute and that petitioner was so prosecuted only upon his refusal to plead guilty to the substantive offense of forgery in return for a five (5) year sentence.

It being well established that the concept of plea bargaining, *par se*, is not unconstitutional. *Santobollo* v. *New York*, 404 U.S. 257 (1970). It is apparent from a review of the record in that no oncroachment was made upon petitioner's constitutional rights, that the petitioner chose to risk the maximum sentence of life imprisonment under the Kentucky habitual criminal statute by electing *to* proceed to trial, rather than accepting a sentence of five (5) years in return for a plea of guilty to the forgery charge then lodged against him.

The petitioner, therefore, has no cause for complaint merely because his "choice" resulted in a substantially groater sentence than would have otherwise been imposed had no accepted to proffered "bargain".

The Court specifically finds that the appeal sought herein is frivolous, is not taken in good faith, and does not present a substantial question, and same is therefore denied and the Court declines to issue a Certificate of Probable Cause herein.

This the 19th day of December, 1975.

/s/ Bernard T. Moynahan, Jr.

Bernard T. Moynahan, Jr., Judge

A True Copy Attest:
Davis T. McGarvey, Clerk
U.S. District Court

By *Josephine H. Elam*, D.C.

APPENDIX

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1334

DONALD BORDENKIRCHER, Superintendent
Kentucky State Penitentiary

Petitioner

—v.—

PAUL LEWIS HAYES

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 28, 1977
CERTIORARI GRANTED JUNE 6, 1977

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 76-1334

DONALD BORDENKIRCHER, SUPERINTENDENT KENTUCKY STATE PENITENTIARY

Petitioner

-V-

PAUL LEWIS HAYES

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

INDEX (Continued)

INDEX (Continued)

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Proceedings

Date 1975	
6-11	Order filed and entered; Petitioner granted leave to proceed in forma pauperis; Petition for Writ of Habeas Corpus heretofore tendered ordered filed. Copies as noted.
6-11	Petition for Writ of Habeas Corpus with affidavit in support thereof filed. (Copies of record on file with Court of Appeals of Kentucky)
6-11	Magistrate's Report and Recommendation filed. Copies as noted.
9- 9	Order filed and entered; Magistrate's Report and Recommendation heretofore filed be and the same is adopted, confirmed, approved, allowed and established as and for the Court's Findings of Fact and Conclusions of Law; Petitioner's Petition for Writ of Habeas Corpus be and the same is denied; Cause is hereby dismissed. Copies as noted with notice of entry given.

10- 9 Petitioner's Notice of Appeal filed with Application for Certificate of Probable Cause.

12-19 Order filed and entered: Court specifically finds that the appeal sought herein is frivolous, is not taken in good faith, and does not present a substantial question, and is denied and the Court declines to issue a Certificate of Probable Cause. Copies as noted.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 76-1409

DATE 1976	FILING—PROCEEDINGS
3-15	Order granting certificate of probable cause.
4- 7	Certified Record filed; cause docketed
5-17	Brief for Petitioner-Appellant
5-17	Proof of Service for Brief for Petitioner-Appellant
6-14	Brief for Respondent-Appellee
6-14	Proof of Service for Brief for Respondent-Appellee
10-26	Notice for oral argument
11-18	Cause argued and submitted (Before: Peck, McCree and Lively, JJ.)
12-20	Motion for leave to file supplemental citation of authority.
12-30	Dismissal of petition reversed and case remanded with instructions to order petitioner's discharge except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument
12-30	Opinion by McCree, J.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1977

1-25	Motion for stay of mandate
2- 2	Order staying mandate thirty days
3- 1	Motion for extension of time for stay of mandate
3- 1	Opposition to Appellee's motion for extension of time for stay of mandate
3-25	Notice of filing petition for writ of certiorari
3-29	Certified copy of order of Supreme Court granting certiorari on 3-28-77

FAYETTE CIRCUIT COURT

THE COMMONWEALTH OF KENTUCKY
Plaintiff

vs: INDEX No. 73-C-26 and 73-C-29

PAUL LEWIS HAYES
Defendant

* * * * *

STATE OF KENTUCKY
Fayette Circuit Court

THE COMMONWEALTH OF KENTUCKY ... PLAINTIFF

VS: TRANSCRIPT OF RECORD No. 73-C-26 and 73-C-29

PAUL LEWIS HAYES ... DEFENDANT

* * * * *

Proceedings of the Fayette Circuit Court (Twenty-Second Judicial District) of Kentucky in the Circuit Court Room of the Fayette County Court House in the City of Lexington.

Honorable James Park, Jr. sitting as Circuit Judge, of Division No. 1.

Be it remembered that heretofore, to-wit:

On the 8th day of January, 1973, the Grand Jury of Fayette County returned into Court an indictment against Paul Lewis Hayes and Larry Wayne Frazier, endorsed in words and figures as follows, to-wit:

THE COMMONWEALTH OF KENTUCKY

Fayette Circuit Court
DIVISION NO. 1
JANUARY 8, 1973
JAN. TERM, 1973
Indictment No. ~~8788~~
73-C-26

THE COMMONWEALTH OF KENTUCKY	**Indictment for: Uttering a Forged Instrument**
VS.	
PAUL LEWIS HAYES **LARRY WAYNE FRAZIER**	**KRS 434.130**

The Grand Jury charges:

On or about the 20th day of November, 1972. in Fayette County, Kentucky, the above named defendants uttered a forged instrument, a check drawn on the account of Brown Machine Works in the amount of $88.30.

against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL

/s/_____
Foreman

FAYETTE CIRCUIT COURT
FIRST DIVISION
January 19, 1973

COMMONWEALTH OF KENTUCKY, ... PLAINTIFF

VS: INDICTMENT (ARRAIGNMENT) NO. ~~8788~~ 73-C-26

PAUL LEWIS HAYES ..... DEFENDANT

* * * * *

The Commonwealth came by Attorney; defendant appeared and being represented by counsel, Hon. A. Norrie Wake; and defendant, with advice of counsel, waived formal arraignment and entered a plea of NOT guilty to the indictment.

It is ordered by the Court that this cause be assigned a pre-trial conference on Wednesday, January 24, 1973 at 9:30 a.m.

/s/ James Park, Jr.

_____
Judge, Fayette Circuit Court

FAYETTE CIRCUIT COURT
DIVISION 1

COMMONWEALTH OF KENTUCKY ..... PLAINTIFF

VS: PRE-TRIAL ORDER INDICTMENT NO. ~~5736~~ 73-C-28

PAUL LEWIS HAYES ..... DEFENDANT

* * * * *

This matter having been assigned for a pre-trial conference; the attorneys having indicated to the Court that the pre-trial conference was held on January 24, 1973; and the Court being sufficiently advised,

IT IS HEREBY ORDERED, as checked below:

The Defendant's motion is assigned for hearing before the Court at _____ A.M./P.M. on _____ the_____ day of _____, 197—.

✓ This matter is assigned for trial by jury at 9:00 A.M. on Wednesday, the 14th day of February, 1973.

The Defendant's Petition to Enter Plea of Guilty is assigned for hearing before the Court at _____ A.M./P.M. on _____, the _____ day of _____ 197—.

✓ This matter is set for a further pre-trial conference at 3:30 P.M. on Friday, January 26th, 1973. Anthony

Todd is substituted as attorney of record in place of A. Norrie Wake.

/s/ James Park, Jr.
JUDGE

TO BE ENTERED:
SERVICE AND NOTICE OF ENTRY WAIVED:

/s/ Glen S. Bagby
Attorney For Commonwealth

ATTORNEY(S) FOR DEFENDANT(S):

/s/ A. Norrie Wake
A. Norrie Wake

/s/ Anthony Todd
Anthony Todd

THE COMMONWEALTH OF KENTUCKY

Fayette Circuit Court
DIVISION NO. 2
JANUARY 29, 1973

January Term, 1975
INDICTMENT NO. 73-C-29

THE COMMONWEALTH OF KENTUCKY	**COUNT NO. 1:** **Indictment for: Uttering a Forged Instrument** **KRS 434.130**
VS.	
PAUL LEWIS HAYES	**COUNT NO. 2** **Indictment for - Habitual Criminal KRS 431.190**

The Grand Jury charges:

COUNT NO. 1:

On or about the 20th day of November, 1972, in Fayette County, Kentucky, the above named defendant uttered a forged instrument, a check, drawn on the account of Brown Machine Works against the peace and dignity of the Commonwealth of Kentucky.

COUNT NO. 2:

Prior to the commission of the offense set forth in Count No. 1 above, the defendant committed and was convicted of the following felonies:

(1) Detaining a Female Against Her Will For the Purpose of Having Carnal Knowledge of Her;

committed on July 19, 1961; convicted by the Fayette Circuit Court on April 26, 1962 and sentenced to seven years in the penetentiary (sic); and

(2) Robbery; committed on January 2, 1970; convicted by the Fayette Circuit Court on January 18, 1971 and sentenced to five years in the penetentiary (sic)

against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL

/s/ _____
Forman

FAYETTE CIRCUIT COURT
FIRST DIVISION
February 2, 1973

COMMONWEALTH OF KENTUCKY, ... PLAINTIFF

VS: INDICTMENT NO. 73-C-29
(ARRAIGNMENT)

PAUL LEWIS HAYES ... DEFENDANT

* * * * *

The Commonwealth came by Attorney; defendant appeared and being represented by counsel, Hon. Anthony Todd; and defendant, with advice of counsel, waived formal arraignment and entered a plea of NOT guilty to Ct. 1 of this indictment, and upon formal arraignment to Ct. 2 of this indictment, entered a plea of NOT guilty.

It is ordered by the Court that this cause be assigned a pre-trial conference this day and a trial date of February 14, 1973.

/s/ James Park, Jr.

Judge, Fayette Circuit Court

FAYETTE CIRCUIT COURT
DIVISION 1
FEBRUARY 2, 1973

COMMONWEALTH OF KENTUCKY ... PLAINTIFF

VS: PRE-TRIAL ORDER INDICTMENT NO. 73-C-29

PAUL LEWIS HAYES ... DEFENDANT

* * * * *

This matter having been assigned for a pre-trial conference; the attorneys having indicated to the Court that the pre-trial conference was held on February 2nd, 1973; and the Court being sufficiently advised,

IT IS HEREBY ORDERED, as checked below:

The Defendant's motion is assigned for hearing before the Court at _____ A.M./P.M. on _____ the _____ day of _____, 197__.

✔ This matter is assigned for trial by jury at 9:00 A.M. on Wednesday, the 14th day of February, 1873.

The Defendant's Petition to Enter Plea of Guilty is assigned for hearing before the Court at _____ A.M./P.M. on _____ the _____ day of _____, 197__.

_____

/s/ James Park, Jr.

JUDGE

TO BE ENTERED:
SERVICE AND NOTICE OF ENTRY WAIVED:

/s/ Glen S. Bagby

ATTORNEY FOR COMMONWEALTH

/s/ W. A. Todd

ATTORNEY(S) FOR DEFENDANT(S):

FAYETTE CIRCUIT COURT
FIRST DIVISION
February 14, 1973

THE COMMONWEALTH OF KENTUCKY, Plaintiff **VS.** **PAUL LEWIS HAYES, Defendant**	**ORDER; Continued** **Indictment No. 73-C-29 & 73-C-26** **Charge: Ct. 1-Uttering a Forged Instrument; Ct-2-Habitual Crim.**

* * * * *

It is ORDERED by the COURT that the above styled case be continued until further ordered by the Court, due to the defense attorney's illness.

/s/ James Park, Jr.

Judge, Fayette Circuit Court

FAYETTE CIRCUIT COURT
Criminal Branch
FIRST DIVISION
March 28, 1973

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

VS: **ORDER ASSIGNING FOR TRIAL** **NO. 73-C-29**

PAUL HAYES **DEFENDANT**

* * * * *

Upon Motion of the Commonwealth and the Court being advised,

IT IS HEREBY ORDERED AND ADJUDGED that the above styled cause will come on for trial on April 19, 1973 in the Fayette County Court House.

Dated this 28th day of March, 1973.

/s/ James Park, Jr.

Judge

March 28 1973
FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
Division No. 1

COMMONWEALTH OF KENTUCKY Plaintiff

vs. ORDER OF ATTENDANCE No. 73-C-29

PAUL LEWIS HAYES Defendant

* * * * *

Upon motion of Attorney for the Commonwealth to the effect that the personal attendance of LARRY WAYNE FRAZIER at the trial of the above action on APRIL 19, 1973, at 9:00 A M. in the Courtroom on the 3rd floor of the Fayette County Courthouse, is necessary, and the Court being advised, it is hereby;

ORDERED that LARRY WAYNE FRAZIER now confined in KENTUCKY STATE REFORMATORY in LA GRANGE, Kentucky, personally appear in this Court on APRIL 19, 1973 at 9:00 A.M., in the Circuit Courtroom, 3rd floor, Fayette County Courthouse, at Lexington, Kentucky for the trial of the above styled action and not to depart without leave of Court and it is FURTHER ORDERED that the appropriate officers having custody of said defendant make the necessary provisions to supervise in transit the custody of said defendant and to produce said defendant in this Court at the time above stated. If for any reason the presence of said defendant is nec-

essary for longer than one day, the officer having custody of him may deliver him to the Fayette County Jailer, who is directed to keep him in the custody of the Fayette County Jail until his presence has been excused, whereupon said defendant shall be returned to LA GRANGE, Kentucky by the SHERIFF of Fayette County.

/s/ James Park, Jr.

Judge, Fayette Circuit Court

FAYETTE CIRCUIT COURT
FIRST DIVISION
April 19, 1973

COMMONWEALTH OF KENTUCKY Plaintiff VS. PAUL LEWIS HAYES, Defendant	TRIAL, VERDICT & JUDGMENT Indictment No. 73-C-29 Charge: Ct. 1—Uttering a Forged Instrument

* * * * *

This 19 day of April, 1973, the defendant, PAUL LEWIS HAYES having appeared in open court with his attorney Hon. Anthony Todd, and the Commonwealth came by Attorney, Hon. Glen S. Bagby

Thereupon came the following jury, to-wit:

Charles E. Elkins, Esther S. Carrea, Elsie Noel, Kenneth W. Roberts, Nancy Rust, Carrie B. Jackson, Melvin Cobb, Mary Lee Davis, Shirley Driver, William K. Clark, James E. Gay, Ola Jean Bottom who were duly empaneled and sworn to hear the case.

Mrs. Peggy Hood, the Official Stenographic Reporter of this Court was directed to record the testimony and proceedings of this trial.

Motions and rulings made during the trial are as shown in the official transcript

The trial progressed and being concluded the jury retired and returned into Court the following verdict, viz:--

"We, the jury, find the defendant guilty as charged in the indictment.

Charles Elkins, Foreman"

By agreement of all parties the jury was allowed to separate under admonition of the Court until Monday, April 23, 1973 at 9:00, to complete further hearing of the case.

/s/ James Park, Jr.

Judge, Fayette Circuit Court

COMMONWEALTH OF KENTUCKY
vs.
PAUL LEWIS HAYES

INSTRUCTIONS TO THE JURY

1. If the jury shall believe from all the evidence beyond a reasonable doubt that:

(a) On April 26, 1962, the defendant, Paul Lewis Hayes, was convicted in the Fayette Circuit Court of the crime of detaining a female against her will for the purpose of having carnal knowledge of her, a felony; and that

(b) on January 18, 1971, the defendant, Paul Lewis Hayes, was convicted in the Fayette Circuit Court of the crime of robbery, a felony, and that said crime of robbery was committed after April 26, 1962; and that

(c) the offense of uttering a forged instrument for which you have found the defendant guilty in this case was committed after January 18, 1971, then you shall fix the defendant's punishment at imprisonment in the penitentiary during his life.

2. If the jury shall have a reasonable doubt from all the evidence that the defendant, Paul Lewis Hayes, was convicted in the Fayette Circuit Court on April 26, 1962, of the crime of detaining a female against her will for the purpose of having carnal knowledge of her, but if the jury shall believe from all the evidence beyond a reasonable doubt that the defendant, Paul Lewis Hayes, was convicted in the Fayette Circuit Court on January 18, 1971, of the crime of robbery and that he received a sentence of five (5) years for such offense, and that the offense of uttering a forged instrument for which you have found

the defendant guilty in this case was committed after January 18, 1971, then you shall fix the defendant's punishment at confinement in the state penitentiary for a period of ten (10) years.

3. If the jury shall have a reasonable doubt from all the evidence that the defendant, Paul Lewis Hayes, was convicted in the Fayette Circuit Court on January 18, 1971, of the crime of robbery, but if the jury shall believe from the evidence beyond a reasonable doubt that the defendant, Paul Lewis Hayes, was convicted in the Fayette Circuit Court on April 26, 1962, of the crime of detaining a female against her will for the purpose of having carnal knowledge of her and that he receivd a sentence of seven (7) years for such offense, and that the offense of uttering a forged instrument for which you have found the defendant guilty in this case was committed after April 26, 1962, then you shall fix the defendant's punishment at confinement in the state penitentiary for a period of fourteen (14) years.

4. If the jury shall have a reasonable doubt that the defendant has been convicted of any prior felony mentioned in Instruction No. 1 above, then you shall fix the defendant's punishment at confinement in the state penitentiary for not less than two nor more than ten years, in your discretion.

5. Your verdict must be unanimous, one of your number signing as foreman.

We, the jury fix the denfendant's punishment at imprisonment in the state penitentiary for life.

CHARLES E. ELKINS, Foreman

FAYETTE CIRCUIT COURT
FIRST DIVISION
April 23, 1973

COMMONWEALTH OF KENTUCKY Plaintiff

vs. No. 73C26 & 73C29

PAUL LEWIS HAYES Defendant

* * * * *

The Commonwealth came by Attorney; defendant appeared and being represented by counsel, Hon. Anthony Todd, and the jury empaneled herein met pursuant to adjournment.

The trial progressed and being concluded the jury retired and returned into Court the following verdict, viz:—

"We, the jury fix the defendant's punishment at imprisonment in the state penitentiary for life.

CHARLES E. ELKINS, Foreman"

The Court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and no sufficient cause was shown why judgment should not be pronounced, and it is therefore by the Court;

ADJUDGED that the defendant is guilty of the crime of Ct. 2—Habitual Criminal and he shall be confined in the State Penitentiary for and during the period of the remainder of his natural life; and this sentence is to run concurrently with prior conviction on Indictment No. 8610.

After fixing sentence, the Court informed the defendant that he has a right to appeal to the Court of Appeals of Kentucky with the assistance of counsel, that if he is financially unable to afford an appeal, a record will be prepared for him at public expense and counsel will be appointed to represent him, that an appeal must be taken within ten (10) days of the date of this judgment and that the clerk of the Court will prepare and file a notice of appeal in his behalf within that time if he so requests. The clerk was directed to file a notice of appeal in forma pauperis for defendant. Pending appeal defendant is to be held without bail.

JAMES PARK JR.
Judge, Fayette Circuit Court

FAYETTE CIRCUIT COURT
FIRST DIVISION
CRIMINAL BRANCH
APRIL 26, 1973

COMMONWEALTH OF KENTUCKY — Plaintiff

vs. Notice Of Appeal — No. 73C26 & 73C29

PAUL LEWIS HAYES — Defendant

* * * * *

Notice is hereby given that PAUL LEWIS HAYES, Defendant, hereby appeals to the Court of Appeals from the Judgment entered against him on April 23, 1973.

KATHERINE M. LADEN, C.F.C.C.

By: Judy Johnson, D.C.

ATTESTED COPIES TO:

Hon. Patrick Molloy
Commonwealth Attorney

Legal Aid
Scott Baesler
Attorney-at-Law

This: 26th day of April, 1973.

FAYETTE CIRCUIT COURT
FIRST DIVISION
MAY 16, 1973

COMMONWEALTH OF KENTUCKY, Plaintiff

vs: O R D E R No. 73C29

PAUL LEWIS HAYES, Defendant

* * * * *

The defendant having requested the Court to set bail pending an appeal to the Court of Appeals and the Court being advised, it is

ORDERED that this case be assigned for a hearing before Judge James Park, Jr. on Friday, June 1, 1973 at 1:30 p.m.

/s/ L. T. GRANT

Judge, Fayette Circuit Court
(Pursuant to RFCC 5 (c)

Attested copy to:

William Anthony Todd

Hon. James Odell

Mailed 5/16/73
R. True, D. C.

FAYETTE CIRCUIT COURT
FIRST DIVISION
June 1, 1973

COMMONWEALTH OF KENTUCKY, Plaintiff

vs. No. 73C29

PAUL LEWIS HAYES, Defendant

* * * * *

On motion of the defendant to set bail on an appeal to the Court of Appeals and the Court being advised it is

ORDERED that bail be set at $10,000.00.

/s/ JAMES PARK JR.

Judge, Fayette Circuit Court

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
FIRST DIVISION
JUNE 25, 1973

COMMONWEALTH OF KENTUCKY, **Plaintiff**

v. ORDER **No. 73-C-26**

PAUL LEWIS HAYES, **Defendant**

* * * * * *

Upon motion of Defendant pursuant to R.Cr. 12.58, and the Court being advised it is ORDERED AND ADJUDGED that the time for filing the record on appeal herein is hereby extended by sixty days making a total of one hundred twenty days to file the record on appeal.

This 25th day of June, 1973.

/s/ JAMES PARK JR.

Judge, Fayette Circuit Court

COPIES TO: HON. GLEN BAGBY
Ass't Commonwealth's Attorney

WILLIAM ANTHONY TODD
Attorney For Defendant

IN THE FAYETTE CIRCUIT COURT
LEXINGTON, KENTUCKY
No. 73C29
JULY 10, 1973

COMMONWEALTH OF KENTUCKY, **Plaintiff**

v. MOTION TO SUSPEND FURTHER EXECUTION OF SENTENCE

PAUL HAYES **Defendant**

* * * * *

Comes the defendant, Paul Hayes, who is without the services of an attorney, and acting as an attorney in his own behalf, respectfully moves this Court for an Order suspending further execution of the sentence of Life imposed upon him by this Court on or about the 23rd day of April, 1973, for the crime of Forgery-Habitual Criminal in violation of KRS 431.190 - 434.130.

This motion is made under the provisions of KRS 439.265 and is filed after more than thirty days, but less than sixty days, since the date of his delivery to the keeper of the institution to which he has been sentenced.

The defendant submits this motion before this Honorable Court for reasons which defendant feels justifiable as set forth in the attached Memorandum In Support.

WHEREFORE this defendant respectfully moves this Court to suspend further execution of the sentence imposed upon him in this case and to place defendant on probation upon such terms as the Court determines, not-

withstanding expiration of the term of Court during which this defendant was sentenced.

Rspectfully submitted,

/s/ PAUL L. HAYES

Defendant, In His Own Behalf
This 9th day of July, 1973

MEMORANDUM IN SUPPORT

The Defendant Paul Hayes moves this Court to suspend execution of his Sentence, and to place him on probation under the provisions of K.R.S. 439.265, and as reasons why this Motion should be sustained, the following is most respectfully submitted.

The Defendant is a Negro Male, 29 years of age, who prior to the judgment and sentence being imposed, resided at 532 Charlotte Court, Lexington, Kentucky, with his Mother, 2 sisters, and two brothers. Defendant contributed to the basic welfare of his family, who also are currently drawing public assistance from the local welfare department.

Should the Court see fit to entertain this application, defendant agrees to abide by the rules and regulations, and to not further violate the laws.

Defendant is a Horse worker and has been assured by his former employer that despite the conviction herein, Defendant can return to work in the same status, as existed, prior to the conviction by this Court.

The Defendant prays that this Court will entertain this application, and suspend further execution of the Sentence, and place him on probation.

So it is ever prayed.

Respectfully Submitted

/s/ PAUL L. HAYES
Defendant

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
FIRST DIVISION
JULY 11, 1973

COMMONWEALTH OF KENTUCKY, **Plaintiff,**

vs. O R D E R

Indictment No. 73-C-29

PAUL LEWIS HAYES, **Defendant**

* * * * * *

The defendant having made a motion under KRS 439.265 to suspend further execution of sentence, and the Court being advised, it is hereby ORDERED and ADJUDGED that the defendant's motion should be, and the same is hereby, overruled.

/s/ JAMES PARK, JR.
Judge

July 11 1973
Copy to:
Mr. Paul Lewis Hayes
c/o Eddyville Penitentiary
Eddyville, Kentucky

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
FIRST DIVISION

COMMONWEALTH OF KENTUCKY, **Plaintiff**

vs. ORDER

No. 73-C-26
73-C-29

PAUL LEWIS HAYES, **Defendant**

* * * * * *

Upon motion of the defendant to appeal in forma pauperis and the Court having considered same,

IT IS HEREBY ORDERED AND ADJUDGE that the defendant, Paul Lewis Hayes, may prosecute his appeal without prepayment of fees and costs, and that the Fayette Fiscal Court shall pay to the court reporter her fee for preparation of the transcript of evidence.

This 21st day of August, 1973.

JAMES PARK JR.

_____
Judge, Fayette Circuit Court

STATE OF KENTUCKY

SCT.

COUNTY OF FAYETTE.

I, Katherine M. Laden, Clerk of the Fayette Circuit Court, in and for the County and State aforesaid, do hereby certify that the foregoing 25 pages, together with official Stenographer's Transcript of Evidence, in Vols. I and II, contain a full, true and correct copy, ordered copied as per Designation of Contents of Record on Appeal herein, of the record and proceedings in the cases wherein THE COMMONWEALTH OF KENTUCKY is Plaintiff and PAUL LEWIS HAYES is Defendant.. Nos. 73-C-26 and 73-C-29, actions lately pending in the aforesaid Court, as the same appears of record and are now on file in my said office.

Witness my hand as Clerk aforesaid, this 22nd day of August, 1973.

KATHERINE M. LADEN, C.F.C.C.

By /s/ Brenda Sabel, D.C.

In forma pauperis

[183]

FAYETTE CIRCUIT COURT
TRANSCRIPT OF EVIDENCE

MR. BAGBY: Yes, sir.

THE COURT: Mr. Todd, would you like to make a statement at this time?

MR. TODD: No, Your Honor, but I would like a brief opportunity to talk with Mr. Hayes at this time.

THE COURT: Ladies and Gentlemen of the Jury, we will take a short recess. During this period of time, you will remember the admonition which I have given to you previously in this case. It does apply in full. So, we will take about a ten-minute recess.

EVIDENCE FOR THE DEFENDANT

The defendant, PAUL LEWIS HAYES, resumed the stand. After being reminded by the Court that he was still under oath, he was examined and testified as follows:

DIRECT EXAMINATION BY MR. TODD:

D1 Paul, you have told the jury before, but I will ask you again, how old are you?

A. Twenty-nine.

D2 You were born in 1944?

A. Yes.

D3 This first charge that you were charged with was in 1961. How old were you when you were first charged with that offense?

[184]

A. Seventeen.

D4 Were you tried by a jury or did you plead guilty?
A. I plead guilty.

D5 To the charge of detaining a female?
A. Yes.

D6 Not to the charge of rape?
A. Yes.

D7 How old were you at that time?
A. Eighteen.

D8 You were sent to the penitentiary?
A. No.

D9 Where were you sent?
A. I was sent to the State Reformatory at La Grange, Kentucky.

D10 Tell the jury, based on your own experience, what the difference is between a penitentiary and a reformatory?
A. The penitentiary has a wall, maximum security, and the State Reformatory has a fence, you know. That

is the difference. See . . . uh . . . the penitentiary, you spend most of your time in cells, but at La-Grange it is just like a college, you do ~ just walk around the campus and things, you know.

D11 How long were you at La Grange, Paul?
A. Five years and three months.

D12 How old were you when you came out?
A. Twenty-three.

D13 Five years and three months. What was the year that

[185]

you came out?
A. I came out in 1967.

D14 Then, in April of 1970, you were indicted on a charge of robbery, is that true?
A. Right.

D15 What sentence did you receive from the jury on that charge?
A. I was sentenced to five years.

D16 Did you serve any of that time?
A. No.

D17 Why not?
A. I was probated.

D18 Who probated you?
A. The courts.

D19 Do you know what the judge's name was that probated you?
A. Mitchell Meade.

D20 What is probation, Paul?
A. Probation is that you have to report to your probation officer every month, but you don't get any time, you just serve it out in the street, you know, you don't -- but, on the five years, I did not go to the institution, they probated me and put it on the shelf . . . on the time. It is still on the self, the five years is up right now . . . shelf time.

D21 And, you were still on probation when you were arrested

[186]

for this offense?
A. Yes, this offense.

D22 Were you able to get out of jail before your trial on this case?
A. No, I was not.

D23 Why not?
A. See, my probation officer, he say that I wasn't – he say he didn't like the way that I was making money, you know. I said, "Man, I cannot work for this kind of money for $75.00 a week." I say, "It takes a lot

for a man to live on in these times, you know." He say, "Well, man, you don't have no kind of working record, man." I say, "Man, my job is flying. I fly horses from California to San Juan, Puerto Rico, you know," and, he say, "Well, I just have to take that job away from you, you know," and, then, I asked him if there was any way I could post bail, you know, and at that time my bond was a thousand dollars. He said, "I am going to keep you here in jail," and I have never made bond since November 20. I have been in jail ever since on that day.

D24 So, what have you done in preparation for your own defense in this case?
A. Explain yourself?

D25 What have you been able to help me do in preparing your defense in this case, having been in jail?

[187]

WITNESS: I don't understand what you are talking about.

D26 Were you able to do anything more than talk to me?
A. I suppose that was the only thing I could do, that's all.

D27 Did you go out and talk to and look for witnesses?
A. No, I couldn't; I couldn't do that.

MR. BAGBY: I will have to object to this line of questioning as being irrelevant.

THE COURT: All right, I think I am going to give the defense a fairly free rein at this point. So, go ahead, Mr. Todd.

D28 You have seen Mr. Bagby prior to Thursday, had you not?

A. Yes.

D29 You, I, and Mr. Bagby have discussed this charge?

A. Yes.

D30 Tell the jury in your own words what you were originally indicted for and came to be indicted as a habitual criminal?

A. Well, I was indicted on uttering a forged instrument and the prosecutor told me, he say, well, uh . . . . " got five years for you this morning." I say, "No, man, I can't handle the five. you know." I say that I want a jury trial, you know. He say, "if you don't take the five years, I am going to indict you on the habitual criminal." I say, "Man, that is your job. There is nothing at this time that I can do nothing about it, but

[188]

except a jury trial you know." Then, he calls me back over here the following week and they write out an indictment on me for habitual criminal, you know. I told him, "Look, man, you know, I have been in the State Reformatory one time and had one number on my back, you know," and, I said, "there's guys who have had six and seven numbers

on their back and they never was tried on the habitual criminal that came out of this court and all across the world, you know. Why do you want to put pressure on me to cop-out before a trial of something that I didn't do." He say, "Well, man, I am going to charge you with – I am going to indict you on the 'hibitch,' man," and that is what he has done, he indicted me on the habitual criminal, you know, and . . . then . . . I am facing another charge as a habitual criminal, you know. That's all I know.

D31 Do you know what the penalty would have been for the charge of uttering a forged instrument?

A. No, he didn't tell me that; he told me to cop-out for five years and, then, but the charge carries from two to ten . . . on uttering a forged instrument, you know.

D32 Is there –

A. I told him, "Man, how come you don't give me a break," and he said, "I am giving you a break with five years." "I take a jury trial on it, man," I said, and that is what I am doing. . . . April 19, I took a jury trial.

[189]

D33 Is there any matter, Paul, that you would like for the jury to consider as they consider what sentence should be imposed for these trials?

A. I would like for them to . . . uh . . . uh . . . See, they don't know – I don't think they know what a

habitual criminal is, you know I don't thinks the jury knows what a habitual criminal is.

D34 Well, the Court will instruct the jury as to the law on the charge of the habitual criminal. Is there anything that you want the jury to know about you personally and your situation?

A. Yes.

D35 Tell them?

A. Ladies and Gentlemen of the Jury, I am speaking in my behalf at this time, that I was charged in 1962 on a charge of rape and I was involved with three guys. One is doing life now, and during that time, I was young. I was seventeen years old and just passing through this place and they involved me in it, you know. I stayed in jail at that time for eleven months on that same charge during that time and I waited and I . . . waited and the two guys that indicated me in the crime at that time talked in my behalf the -- and the prosecutor, Paul Mansfield, he said, "Paul, we are going to give you a plea and if you cop-out for seven years, that will be a good deal for you." I say, "Seven years is a long time

[190]

out of a man's life for something that he didn't do." I was young and I didn't understand the law then like I know today and I went on and accepted the seven years and went on down to the State Re-

formatory and done my five years and three months as a serve-out and came out in 1967.

D36 Tell the jury what you mean by a serve-out?

A. A serve-out on a seven-year sentence -- I done it all; I done five years and three months . . . out of the seven, you know.

D37 Are you given any time off for good behavior?

A. Yes, I got three months -- I got ninety days off each year.

D38 Three months out of each twelve?

A. Yes.

D39 So, that the five years and three months added up to seven years?

A. Yes.

D40 And there was no parole?

A. No, there was no kind of people reporting to or nothing, you know.

MR. TODD: All right, go ahead.

A. (Cont'd) And, during that time, I was talking to this prosecutor . . . on this charge here . . . why that he wanted to indict me on the "hibitch." I explained it to him and we had a little argument as we chat a little bit

[191]

in there, you know, and . . . and I kept talking

to him and said, "Man, there is people walking the streets right today that are seven- and eight-time losers and six-time losers and they have been convicted on armed robbery and all kinds of crimes." I say, "Them guys have come through these courts and they never was tried on a habitual criminal." I say, "I have had only one number on my back and you want to put me away for the rest of my life," and, I say, "But, I am not going to cop-out for the five years, you know, I am going to let the jury try me." He say, "Well, if that is what you got to do." I said, "I am going to take my odds with the jury, you know," and, that is the reason I am sitting here today. That is it, that is all I know.

MR. TODD: That is all.

CROSS EXAMINATION BY MR. BAGBY:

X1 Mr. Hayes, then, it is your testimony that you were convicted in this Court for detaining a female in 1962 and given seven years?

A. Right.

X2 Thereafter, you committed the crime of robbery for which you served -- for which you were convicted of in 1970 in this Court and given five years, is that correct?

A. Probated.

X3 But, you were found guilty, were you not?

[192]

A. Yes.

X4 By a jury?

A. Yes.

X5 You had a lawyer trying your case for you, did you not?

A. Yes.

X6 And, then, on November 20, 1972, when you were arrested at the Pic-Pac market and charged with uttering this forged instrument, which the Court and jury has already found you guilty of, in the presence of Larry Wayne Frazier and taken to court, isn't it a fact that again you were appointed an attorney?

A. Yes.

X7 And, this attorney was present when you came to cop-out court, wasn't he?

A. Yes.

X8 Will you tell the jury what cop-out court is?

A. No, you tell them, I don't know . . . You tell them.

X9 Isn't it a fact that you were aware that cop-out court is the time when the prosecutor, the defense lawyer, the defendant, and the Clerk – like Mr. True – meet together not in the Judge's presence and before any jury is called and before any witnesses are subpoenaed, and the prosecutor makes a recommenda-

tion to the defendant, what he will recommend if the defendant intends to plead guilty to save the jury's time, the witnesses' time, and the court's time in coming to trial, isn't that right?

[193]

A. No.

X10 All right, what is cop-out court, if that is not right?
A. Cop-out to me is that . . . uh . . . you offered me a five-year plea and you told me if I didn't take five years that you would indict me on the habitual criminal. That is what you done.

X11 All right, was the Judge there?
A. No.

X12 Was the jury there?
A. No.

X13 Was your lawyer there?
A. That's right, yes.

X14 And, I was there?
A. Yes.

X15 And, I made these statements to you all both in the presence of both of you, didn't I?
A. No.

X16 I didn't talk to you privately, did I?
A. No.

X17 Your lawyer, Mr. Wake, was there during the entire time, wasn't he?
A. That's right.

X18 And, then, I left you and Mr. Wake alone to discuss it by yourself -- by yourselves in a room by yourselves?
A. No, no, no.

X19 You and Mr. Wake did not discuss this matter by yourselves

[194]

in a room and I left and, then, later I came back and asked what you wanted to do?
A. No, you walked out of the room and you threatened me with the habitual criminal, you know, and –

X20 And, then I walked out of the room, didn't I?
A. You walked out of the room.

X21 And, I told you that the law was that there was a habitual criminal act that I had to place against you?
A. No, you did not tell me that; you told me that you was indicting me on the "hibitch" if I didn't take the five-year plea. That is what you told me.

X22 Isn't it a fact that I told you at that time if you did not intend to plea guilty to five years for this charge and that they had caught you inside and that your accomplice had made a statement against you – isn't

it a fact that I told you at that time that if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?

A. No.

X23 I did not tell you that I was going to return to the grand jury?

A. No.

X24 I told you out of my own –

A. You told me that you was going to indict me – you told

me you was going to indict me on the habitual criminal and you called me back over here the following week on a Friday and I . . . answered the indictment on the habitual criminal. That was it. That was all that you told me.

X25 You were arraigned on that charge that the grand jury had brought against you, weren't you?

A. On the "hibitch."

X26 And, you were asked how you pled to the charge, weren't you?

A. Yes.

X27 And, at that time, you had a lawyer present too, didn't you?

A. Yes.

X28 In fact, you have had a lawyer throughout these proceedings, haven't you?

A. Sure, yeh.

X29 Now, when you first went to the Reformatory in 1962, you were eighteen years old, is that right?

A. Right.

X30 And, at that time, did you learn what the habitual criminal was?

A. Yeh, I learned that, yeh.

X31 What is the name that the people have at the penitentiary for the habitual criminal?

A. The "hibitch."

X32 The "hibitch," is that right?

A. Yes, the "hibitch."

X33 So, you knew in 1962 what the effects of the habitual criminal were?

A. No.

X34 But, you –

A. (Cont'd) Them guys coming in there with six and

seven times. No, I did not know what – I did not know that three convictions was a habitual criminal.

X35 But, some were coming in that had been convicted of a habitual criminal, wasn't there?

A. Yeh, six times . . . six-time losers.

X36 Some of them had been coming in there, hadn't there?

A. No, no, they was convicted on a six-time loser . . . in 1962.

X37 You have been aware that there is such a charge since 1962, haven't you?

A. Habitual criminal, yes.

X38 And, that was before the robbery and before the forgery, wasn't it?

A. That was – that was . . . uh . . . before the – you said before the robbery and after-?

X39 And before the forgery?

A. No.

MR. BAGBY: That's all.

THE COURT: Anything further, Mr. Todd?

MR. TODD: I have nothing further.

RENDERED: MARCH 1, 1974

COURT OF APPEALS OF KENTUCKY
FILE NO. 73-766

PAUL LEWIS HAYES — Appellant

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES PARK, JR., JUDGE
Indictment NOS. 73-C-26, 73-C-29

COMMONWEALTH OF KENTUCKY — Appellee

MEMORANDUM OPINION OF THE COURT BY JUSTICE JONES

AFFIRMING
(Not be be cited as authority)

Paul Lewis Hayes was convicted in the Fayette Circuit Court on a two-count indictment, charging him in Count No. 1 with the principal offense of uttering a forged instrument, under KRS 434.130, and in Count No. 2 of having been convicted of two prior felonies, under KRS 431.190. The trial court first tried Hayes on the principal offense of uttering a forgery, and then he was tried under the habitual criminal statute. The Jury found him guilty on both counts and fixed his punishment at confinement in the state penitentiary for life. Upon this appeal, Hayes contends: (1) the trial court erred in failing to direct a verdict in his behalf, he contending that the evidence was insufficient to support the conviction; (2) the trial court erred in failing to instruct the jury as to

the requirement of corroboration of the testimony of an accomplice; (3) he was denied due process and equal protection of the law by the habitual criminal conviction because the mandatory life sentence required by the statute is cruel and unusual punishment.

We have examined the evidence, and we are convinced that it establishes that appellant participated in the crimes with which he is charged. The Commonwealth proved that appellant presented a check to the Pic Pac grocery; that the check presented was stolen from Brown Machine Works; and that the check did not bear an authorized signature. Thus there was an inference that Hayes either had forged the unauthorized signature or knew it to have been forged. It was incumbent on him to satisfactorily explain the uttering or the forgery.

In Smith v. Commonweaalth, Ky., 307 S.W.2d 201, (1957), we stated:

> "When the evidence shows the name attached to the instrument has been forged, the inference arises that the person who uttered it as genuine either forged the instrument or knew it to be forged, and unless the uttering or forgery is explained satisfactorily, the presumption becomes conclusive." Smith v. Commonwealth, supra, 203.

Appellant's next contention, that the trial court should have given an instruction as to the requirement of corroboration of an accomplice's testimony, is wholly without merit. Appellant failed to object to the instructions in the trial court. The failure constituted a valid waiver so as to preclude Hayes from securing a reversal of his conviction upon the basis of any alleged error

therein. RCr 9.54(2); Johnson v. Commonwealth, Ky., 477 S.W.2d 159 (1972); Alsip v. Commonwealth, Ky., 482 S.W.2d 571 (1972).

Hayes next argues that his constitutional rights were abridged by the habitual criminal charge and by his subsequent conviction thereunder. He complains of the leverage available to the Commonwealth's Attorney in deciding whether or not to have an accused indicted under the Habitual Criminal Act, KRS 431.190.

In a pre-trial conference in this case, the Commonwealth's Attorney offered to recommend a five-year sentence if Hayes would plead guilty to the charge of uttering a forgery. This he refused to do although he was advised by the prosecutor that the case would be resubmitted to the grand jury for a new indictment under the Habitual Criminal Act. Based upon our holding in Cunningham v. Commonwealth, Ky., 447 S.W.2d 18 (1969), we conclude that it was not error for the Commonwealth's Attorney to resubmit the case to the grand jury. We save said:

> "Assuming, however, that the Commonwealth's Attorney was still in a position, in the event Cunningham had then chosen to plead not guilty, to resubmit the cases to the grand jury and ask for new indictments under the Habitual Criminal Act, we are of the opinion nevertheless that this is not the kind of pressure that could be held to affect the voluntariness of a guilty plea. A person charged with a criminal offense always is under the pressure of risking a maximum sentence at the hands of the jury or the court if he does not accede to what the Commonwealth is willing to

> recommend. The more serious the offense, the greater is the pressure, and it is even more so when the Commonwealth has a strong case. To say that the attorney for the Commonwealth could not use these advantages in discussing the terms and prospects of settlement on the basis of a guilty plea would mean simply that there could be no such settlements. We are unwilling to accept that result." Cunningham v. Commonwealth, supra, 83.

Here Hayes risked the maximum sentence of life imprisonment for a sentence of five years. He cannot now complain of his bad bargain.

Finally Hayes argues that a mandatory life sentence under the Habitual Criminal Act in his case is too severe a penalty, constituting cruel and unusual punishment. In light of the previous felonies of which he had been convicted, viz., detaining a female against her will (a lesser offense of rape), and robbery, we think the punishment is not too harsh. We have held the Habitual Criminal Act, KRS 431.190, to be constitutional. Barber v. Thomas, Ky., 355 S.W.2d 682 (1962).

The punishment authorized by the statute was not wrongly or disproportionately applied to the appellant. Accordingly the judgment is affirmed.

All concur,

ATTORNEYS FOR APPELLANT:
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ATTORNEYS FOR APPELLEE:
Ed W. Hancock
Attorney General

Robert L. Chenoweth
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

FILED JUNE 11, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT
LEXINGTON

PAUL LEWIS HAYES — Petitioner

vs. — Case No. 75-61

HENRY COWAN, WARDEN
KENTUCKY STATE PENITENTIARY — Respondent

PETITION FOR WRIT OF HABEAS CORPUS

Comes the Petitioner, with Counsel, and pursuant to Sec. 2254 of Title 28, United States Code petitions this Court for a Writ of Habeas Corpus, and as grounds states the following:

1. That he is presently incarcerated in the Kentucky State Penitentiary at Eddyville, Kentucky, on a life sentence imposed by Circuit Judge James Park of the Fayette County Circuit Court, Lexington, Kentucky, on the offense of being an habitual offender under KRS 431.190, Indictment Numbers 73-C-26, 73-C-29. This sentence was imposed on April 23, 1973.

2. That the Petitioner was found guilty by a jury after a trial pursuant to his not guilty plea.

3. That the Petitoner appealed the conviction to the Kentucky Court of Appeals, who affirmed the conviction in an opinion issued on March 1, 1974 which was not reported but a copy is attached to this Petition as Appendix I.

4. That the Petitioner was denied due process of law and equal protection of the law in that: a) the mandatory life sentence under Kentucky's Habitual Criminal Statute, KRS 431.190 is not uniformly applied and constitutes cruel and unusual punishment; b) the indictment and conviction under the Habitual Criminal Statute was vindictively sought by the Commonwealth of Kentucky in this case; and c) a life sentence in Petitioner's case is so disportionate that it constitutes cruel and unusual punishment.

5. That the facts which support the above grounds are as follows: a) The Petitioner at his own trial testified that he personally knew of inmates with six or seven felonies who had never been tried as a habitual criminal. His co-defendant in this case, testified about two previous felonies on which he had been convicted and yet he was not charged with being a habitual criminal. The Kentucky Court of Appeals took note of the fact that not everyone with two felony convictions had habitual criminal indictments sought against them (See *Byrd* v. *Commonwealth*, Ky., 463 S.W.2d 333 (1971);b) The Petitioner was indicted by the Fayette County Grand Jury on January 8, 1973 on the charge of uttering a forged instrument and was arraigned on that charge on January 19, 1973 at which time a pre-trial conference was set for Wednesday, January 24, 1973. A further pre-trial conference was set for January 26, 1973 at the January 24th pre-trial conference and another attorney was assigned to the Petitioner. On January 29, 1973 a new indictment was returned against the Petitioner charging him again with the Habitual Criminal Statute.

The Trial Court at the beginning of the trial an-

nounced that the trial would be bifurcated as to the principal charge and the charge under the Recidivism Statute. At the beginning of the second phase of the trial, the Petitioner, himself, made known to the Trial Court his objection to the manner he was indicted on the habitual criminal charge. He stated that the Commonwealth offered him five years to plead guilty on the principal charge and further said that if he didn't take the five years, he would be indicted as a habitual criminal, which was never refuted by the Commonwealth. The petitioner in his testimony testified that his refusal to plead guilty was why he had been indicted under the habitual criminal statute, again not refuted by the Commonwealth. In fact, the Assistant Commonwealth Attorney, Hon. Glen S. Bagby, in his questioning supported Petitioner's contention by asking the following question:

> Isn't it a fact that I told you at that time if you did not intend to plead guilty to five years for this charge and that they had caught you inside and that your accomplice had made a statement against you — isn't it a fact that I told you at that time that if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?

All of these uncontroverted facts establish that the Petitioner was indicted under Kentucky's Habitual Criminal Statute as a vindictive action by the Commonwealth because he refused to plead guilty; c) Petitioner is now twenty-nine years old and when the charge on the first felon was brought against him he was a seventeen year

old minor. He plead guilty to the charge and served five years and three months at the Kentucky State Reformatory at La Grange, Kentucky. His next charge was that of robbery for which a jury gave him a sentence of five years. However, he was probated for that charge. The prior criminal record of the Petitioner is not one which suggests that it is necessary to confine him in a penal institution for the rest of his life in order to prevent him from further commission of crime. His first offense, certainly the most serious, was committed while he was a minor; the second was such that a judge granted him probation, and for the third offense, the least serious, he receives a mandatory life sentence.

6. That Petitioner has not filed any Motions pursuant to RCr 11.42 in Kentucky's Court, nor other Petition for Writ of Habeas Corpus in State or Federal Court, or any Petitions for Writ of Certiorari in the United States Supreme Court. A Notice of Appeal to the Kentucky Court of Appeals and outlined in paragraph 3.

7. That all the grounds set forth in paragraph 4 and the facts set forth in paragraph 5 were raised in Petitioner's appeal to the Kentucky Court of Appeals and were discussed in their Opinion.

8. That he was represented at arraignment by both A. Norrie Wake, 101 N. Limestone Street, Lexington, Kentucky 40507 and William A. Todd, 145 Market St., Lexington, Kentucky 40507; that Mr. Todd also represented Petitioner at trial. That the Petitioner was represented on appeal and in this action by Paul F. Isaacs, 625 Leawood Drive, Frankfort, Kentucky 40601.

That based on the allegations set out above, the Pe-

titioner respectfully prays that this Court issue a Writ of Habeas Corpus in this action.

/s/ PAUL LEWIS HAYES

Petitioner

Paul Lewis Hayes, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the ifformation therein is true and correct to the best of his knowledge and belief.

/s/ PAUL LEWIS HAYES, Affiant

Subscribed and sworn to before me this 29 day of Jan., 1975.

/s/ H. R. PATTERSON
Notary Public

My Commission Expires: 12-22-78.

/s/ PAUL F. ISAACS
Assistant Public Defender
625 Leawood Drive
Frankfort, Kentucky 40601

Counsel for Petitioner

UNITED STATES DISTRICT COURT
EASTERN DISTRICT

PAUL LEWIS HAYES — Petitioner

vs. — Case No ____

HENRY COWAN, Warden
KENTUCKY STATE PENITENTIARY — Respondent

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I.

THE MANDATORY LIFE SENTENCE REQUIRED BY THE HABITUAL CRIMINAL STATUTE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AS NOT UNIFORMLY APPLIED.

It should be noted that since the death penalty was struck down in *Furman* v. *Georgia*, 408 US 238, 92 S. Ct. 2726, 33 LEd 2d 346 (1973), and at the time of Petitioner's conviction, Kentucky had only two other crimes with mandatory life sentences — Murder, KRS 435.010, and Rape of a Child under Twelve, KRS 435.080. In all other crimes, the jury is given discretion in determining the degree of the sentence in terms of years or life. Also, under Kentucky's Habitual Criminal Statute, KRS 431.190, the nature of the previous felonies is not taken into consideration. Three nonviolent felonies can result in a life sentence the same as three violent crimes. The *Furman, supra*, case established as one of the criteria for prohibit-

ing the death penalty that the sentence was not uniformly applied to all those subject to that penalty. As Mr. Justice Stewart said:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968,[11] many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.[12] * * * * * * I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed. *Id.* at pp. 309, 310.

The imposition of the mandatory life sentence under the Habitual Criminal Statute is also randomly applied in Kentucky, as the facts set forth in the Petition for a Writ of Habeas Corpus establish.

Since the Habitual Criminal Statute is used randomly by Prosecutors without any guidelines or standards, it constitutes cruel and unusual punishment. One of the *Furman*, supra tests is the fairness and uniformity by which the punishment is applied. The procedures prevalent in Kentucky and followed in this case of arbitrarily seeking indictments for being a habitual criminal against some defendants and not for others constitute cruel and unusual punishment. The Eighth Amendment prohibition against cruel and unusual punishment incorporates the equal protection clause of the Fourteenth Amendment and requires that punishment be administered uniformly.

The life sentence given the Appellant in this case certainly violate the *Furman,* supra standards and should be set aside.

11

THE COMMONWEALH VINDICTIVELY SOUGHT AN INDICTMENT UNDER THE HABITUAL CRIMINAL STATUTE BECAUSE THE APPELLANT REFUSED TO PLEAD GUILTY.

This case illustrates the sordid affair plea bargaining can become if courts refuse to exercise any control over the heavy-handed tactics of prosecutors. The Petitioner merely maintained his innocence during the plea bargaining session and insisted on his right to a jury trial and because he chose to exercise his constitutional rights, the Commonwealth sought an indictment under Kentucky's recidivism statute.

The procedures employed in this case are so blatantly vindictive as to violate due process as set forth in *Pearce* v. *North Carolina,* 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The threat of prosecution for being a habitual criminal should not be allowed to exist as a cudgel to coerce a man who maintains his innocence to enter a plea of guilty. *Pearce* v. *North Carolina, supra,* clearly sets forth the principle that vindictiveness by a court against a defendant exercising, in that case not a constitutional right but a statutory right, his right to appeal denies that defendant due process of law and this same principle was applied to county attorneys in *Sefcheck* v. *Brewer,* 302 F. Supp. 793 (1969). Surely due process of law prohibits a Commonwealth Attorney from seeking an indictment against the Petitioner because he

demands a jury trial in which the maximum penalty for the present indictment was ten years and by adding the habitual criminal count increased the penalty to mandatory life imprisonment. The Petitioner submits that the concept of due process minimumly prohibits prosecutors from taking undue advantage over a defendant accused of a crime who maintains his innocence. There should be no place in our system for vindictive prosecutions based solely on the defendant's insistence on his constitutional right to a jury trial.

III

THE MANDATORY LIFE SENTENCE REQUIRED BY THE HABITUAL CRIMINAL STATUTE IS CRUEL AND UNUSUAL PUNISHMENT IN THIS CASE.

In *Hart* v. *Coiner*, 483 F. 2d 136, (4th Cir. 1973), cert. denied March 18, 1974, the Fourth Circuit set forth four standards for evaluation: a) Nature of the Offense; b) legisiative purpose; c) comparison of penalty with other states; and d) comparison of penalty with other offenses with the same penalty. In that case, the Fourth Circuit held:

> The doctrine that an excessive sentence may be invalid solely because of disproportionality is not a new one. Mr. Justice Field suggested in 1892 that the eighth amendment's prohibition is directed not only against torture or barbarism, "but (also) against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." *O'Neil* v. *Vermont*, 144 US 323, 339 (1892) (Field, J., dissenting).

In *Weems* v. *United States*, 217 US 349, 367 (1910), the Court adopted Mr. Justice Field's view of the eighth amendment when it stated that it is now "a precept of justice that punishment for crime should be graduated and proportioned to offense." In *Weems*, the Court noticed, with apparent approval, that the highest state court of Massachusetts had previously conceded the possibility that "punishment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment." Weems, supra, at 368; accord, *Ralph* v. *Warden*, 438 F. 2d 786 (4th Cir. 1970).

In his concurring opinion in Furman, Mr. Justice Douglas finds the idea of disproportionality as old as the Magna Carta: "A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity . . ." *Furman, supra*, at 243.

While it seems settled that punishment must be proportioned to the offense committed, application of this principle to a particular fact situation is not without difficulty. That the proportionality concept is not static, but is a "progressive" one which "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," enhances the difficulty. *Trop* v. *Dulles*, 356 US 86, 101 (1958).

Although the standard applicable under the eighth amendment is one "not susceptible to precise defini-

> tion," there are several obective factors which are usful in determining whether the sentence in this case is constitutionally disproportionate. The test to be used is a cumulative one focusing on an anlysis of the combined factors. *Furman, supra,* at 282 (Brennan, J., concurring). (*Id.* at pp. 139-140)

The *Hart, supra,* case then went on to analyse Dewey Hart's conviction in light of the four standards.

The Petitioner was indicted and convicted of uttering a forgery which has a maximum penalty of ten years. KRS 434.130. He was also indicted under Kentucky's Recidivism Statute which carries a mandatory life imprisonment penalty. KRS 431.190. The two previous felonies the Petitioner had been convicted of were Detaining a Female Against Her Will in 1962 and Robbery in 1971.

The nature of the principal offense and the prior offenses is one of the most important considerations in determining whether the mandatory life sentence is cruel and unusual in Petitioner's case. An analysis of Petitioner's convictions reveal that the most serious offense, the first one, was committed while he was a minor. It is interesting to note that under Kentucky's newly adopted Penal Code, the conviction of Petitioner while he was a juvenile could not be considered toward a habitual criminal. KRS 532.080(b) Under that statute the Petitioner would not be a persistent felony offender. Even if the Petitioner's first felony were taken into consideration, the most the Petitioner would receive under the new Penal Code would be twenty years. The very state which is now incarcrating Petitioner for life has now rejected the mandatory provisions of their previous recidivism statute.

The prior criminal record of the Petitioner is not one which suggests that it is necessary to confine him in a penal institution for the rest of his life in order to prevent him from further commission of crime. His first offense, certainly the most serious, was committed while he was a minor; the second was such that a judge granted him probation, and now the third offense, the least serious, for which he receives a mandatory life sentence. The life sentence is so harsh and unjustifiable on any rehabilative or humane principal of treatment of criminal offenders as to constitute cruel and unusual punishment.

For the reasons stated above, the Petitioner respectfully requests that a Writ of Habeas Corpus be issued.

PAUL F. ISAACS
ASSISTANT PUBLIC DEFENDER
625 Leawood Drive
Frankfort, Kentucky 40601

/s/ Paul F. Isaacs

COUNSEL FOR PETITIONER

FILED JUNE 11, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL LEWIS HAYES ..... PETITIONER

VS MAGISTRATE'S REPORT
AND RECOMMENDATION

HENRY COWAN, Warden, Etc. ..... RESPONDENT

* * * * *

The petitioner, alleging that he is incarcerated in the State Penitentiary at Eddyville, has tendered for filing a petition for writ of habeas corpus. He has filed therewith a motion for leave to proceed *in forma pauperis*, which motion is supported by an affidavit of poverty. In accordance with 28 U.S.C. §636(b), and pursuant to a General Order of this Court, the aforesaid documents have been referred to the undersigned Magistrate for preliminary review.

In his tendered pleading the petitioner alleges that his confinement is the result of his convictions, following a bifurcated trial, of the offenses of forgery and of being a habitual criminal. He contends that his conviction as a habitual criminal violates his constitutional rights in that the mandatory sentence of life imprisonment imposed upon such conviction amounts to cruel and unusual

punishment; in that the selective application of Kentucky's habitual criminal statute causes said life sentence to amount to cruel and unusual punishment; and in that the "vindictive" application of the habitual criminal statute to the petitioner violates his right to due process of law. A copy of an opinion of the Kentucky Court of Appeals attached to the tendered petition demonstrates that the petitioner has presented substantially identical contentions to the Kentucky courts by direct appeal.

In the opinion of the Magistrate, the tendered petition is patently without merit. As held in *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962), "the constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge". Moreover, only in the deliberate presence of such factors as race, religion or other arbitrary classification will the courts review the exercise of prosecutorial selection and discretion, even when the exercise of such discretion results in different treatment of co-defendants originally charged with the same offenses in the same case. *Oyler* v. *Bols*, *supra* at page 456; *United States* v. *Bland*, 472 F. 2d 1329, 1336 (D.C. Cir. 1972), cert. denied 412 U.S. 909.

There is authority for the proposition that any sentence, including a mandatory sentence of life imprisonment upon conviction of being a habitual criminal, may amount to cruel and unusual punishment, if wholly disproportionate to the nature of the underlying offense and unnecessary to the achievement of any legitimate legislative purpose. *Weems* v. *United States*, 217 U.S. 349 (1910); *Hart* v. *Coiner*, 483 F. 2d 136, 143 (4th Cir. 1973), cert. denied 415 U.S. 938. However, as noted by the Kentucky

Court of Appeals in the instant case, the convictions underlying the petitioner's habitual criminal conviction were detaining a female (a lesser included offense of the charge of rape), robbery and forgery. As conceded by the petitioner, the subject felonies occurred during a 12 year period beginning when the petitioner was 17 years old. One convicted of violating Kentucky's habitual criminal statute is not thereby rendered ineligible for parole, and, in the opinion of the Magistrate, it cannot be said that it is shocking, disproportionate or unnecessary to a legitimate legislative purpose to require one with a record such as that admitted by the petitioner to serve a substantial period of actual incarceration and to be subject to parole supervision for the rest of his life.

The petitioner's remaining complaints derive from the fact that not all Kentucky defendants having prior felony convictions are prosecuted under the state's habitual criminal statute and that the petitioner was so prosecuted only upon his refusal to plead guilty to the substantive offense of forgery, in return for a five year sentence. It is well settled that there is nothing unconstitutional, *per se*, in the concept of plea bargaining and that a defendant's constitutional rights are not violated by forcing him to choose between a lesser penalty, in return for the entry of a plea of guilty, as opposed to exposing himself to the risk of a greater penalty if he elects to be tried upon a plea of not guilty. *Santobello* v. *New York*, 404 U.S. 257 (1971); *North Carolina* v. *Alford*, 400 U.S. 25 (1970). If prosecutors were precluded from seeking conviction of more serious offenses following the rejection by defendants of the opportunity to plead guilty to lesser offenses, the entire concept of plea bargaining

would be effectively destroyed, and, as noted previously herein, in the absence of some claim of invidious discrimination, a defendant's rights are not violated simply because a prosecutor may elect to use the leverage of an applicable habitual criminal statute against him, while not use the same leverage against other defendants.

In summary, it would appear that the petitioner's position was well stated by the Kentucky Court of Appeals in the opinion appended to the tendered petition. As noted by that Court, the petitioner risked the maximum sentence of life imprisonment for a sentence of five years. He cannot now complain of his bad bargain.

The Magistrate will this day enter an Order granting the petitioner leave to proceed *in forma pauperis* and directing that the petition for writ of habeas corpus heretofore tendered by the petitioner be filled herein. However, for those reasons discussed above, it is the Magistrate's recommendation that said petition be denied and that this action be dismissed.

This 11th day of June, 1975.

DAVID R. IRVIN

David R. Irvin, U.S. Magistrate

FILED JUNE 11, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL LEWIS HAYES ..... PETITIONER

VS ORDER NO. 75-61

HENRY COWAN, Warden, Etc ..... RESPONDENT

* * * * *

The petitioner having heretofore tendered for filing a petition for writ of habeas corpus and having filed therewith a motion for leave to proceed *in forma pauperis*, which motion is supported by an affidavit of poverty, it is now therefore ORDERED that the petitioner be granted leave to proceed *in forma pauperis* and that the petition for writ of habeas corpus heretofore tendered for filing by the petitioner be filed herein.

This 11th day of June, 1975.

DAVID R. IRVIN

David R. Irvin, U.S. Magistrate

FILED SEPTEMBER 9, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL LEWIS HAYES ..... PETITIONER

VS ORDER CIVIL NO. 75-61

HENRY COWAN, Warden, Etc. ..... RESPONDENT

* * * * *

The Court having considered the entire record herein, including the Magistrate's Report and Recommendation heretofore filed herein on June 11, 1975, and being sufficiently advised;

IT IS NOW THEREFORE ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) That the Magistrate's Report and Recommendation heretofore filed herein be and the same is hereby adopted, confirmed, approved, allowed and established as and for the Court's Findings of Fact and Conclusions of Law herein.

(2) That the petitioner's Petition for Writ of Habeas Corpus be and the same is hereby denied.

(3) That this cause be and the same is hereby dismissed.

This the 9th day of September, 1975.

BERNARD T. MOYNAHAN, JR.

Bernard T. Moynahan, Jr., Judge

FILED OCTOBER 9, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

PAUL LEWIS HAYES Petitioner	)	
V.	)	CIVIL NO. 75-61
HENRY COWAN, Superintendent, Kentucky State Penitentiary, Respondent	)	

NOTICE OF APPEAL

Notice is hereby given that the Petitioner appeals from the order in the above styled action entered on September 9, 1975 dismissing the above styled action.

Respectfully submitted,

PAUL F. ISAACS
ASSISTANT PUBLIC DEFENDER
625 Leawood Drive
Frankfort, Kentucky 40601

COUNSEL FOR PETITIONER

FILED OCTOBER 9, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

PAUL LEWIS HAYES Petitioner	)	
V.	)	CIVIL NO. 75-61
HENRY COWAN, Superintendent, Kentucky, State Penitentiary, Respondent	)	

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

Pursuant to 28 U.S.C. §2253, the above-named Petitioner requests that he be granted a Certificate of Probable Cause for the appeal in the above-captioned action.

Respectfully submitted,

PAUL F. ISAACS
ASSISTANT PUBLIC DEFENDER
625 Leawood Drive
Frankfort, Kentucky 40601

COUNSEL FOR PETITIONER

NOTICE

Please take notice that the foregoing Motion will be filed on the 9th day of October, 1975 with the Clerk of the United States District Court for the Eastern District of Kentucky at Lexington.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been mailed, postage prepaid to Hon. Ed W. Hancock, Attorney General, Capitol Building, Frankfort, Kentucky 40601, this 9th day of October, 1975.

FILED DECEMBER 19, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL LEWIS HAYES ..... PETITIONER

VS. ORDER CIVIL 75-61

HENRY COWAN, Superintendent
Kentucky State Penitentiary ..... Respondent

* * * * *

This petition for a Writ of Habeas Corpus is grounded on the claim of petitioner that his conviction as a habitual criminal violates his constitutional rights in that: the mandatory sentence of life imprisonment imposed upon such conviction equates to cruel and unusual punishment; the selective application of Kentucky's habitual criminal statute causes said life sentence to amount to cruel and unusual punishment; and the allegedly "vindictive" application of the habitual criminal statute to the petitioner violates his due process of law.

The claim that the mandatory life imprisonment sentence imposed upon one convicted of the Kentucky habitual criminal statute equates to cruel and unusual punishment is clearly without merit. As was well stated in *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962):

". . . the constitutionality of the practice of inflict-

ing severe criminal penalties upon habitual offenders is no longer open to serious challenge".

Moreover, absent some arbitrary classification, the courts will abjure the review of prosecutorial discretion, albeit the exercise of such discretion may result in different treatment of co-defendants originally charged with identical offenses in the same case. *Olyer* v. *Boles, supra* at page 456.

The Court observes that the convictions underlying the petitioner's habitual criminal conviction were crimes of a most serious nature and thereby concludes that the sentence received upon conviction of being a habitual criminal was not disproportionate to the nature of the underlying offenses, and that the mandatory sentence imposed was necessary to the achievement of a legitimate legislative purpose.

Petitioner's remaining claims emanate from the fact that not all Kentucky defendants having the requisite number of prior felony convictions are prosecuted under the state's habitual criminal statute and that petitioner was so prosecuted only upon his refusal to plead guilty to the substantive offense of forgery in return for a five (5) year sentence.

It being well established that the concept of plea bargaining, *per se*, is not unconstitutional. *Santobollo* v. *New York*, 404 U.S. 257 (1970). It is apparent from a review of the record in that no encroachment was made upon petitioner's constitutional rights, that the petitioner chose to risk the maximum sentence of life imprisonment under the Kentucky habitual criminal statute by electing

to proceed to trial, rather than accepting a sentence of five (5) years in return for a plea of guilty to the forgery charge then lodged against him.

The petitioner, therefore, has no cause for complaint merely because his "choice" resulted in a substantially greater sentence than would have otherwise been imposed had he accepted to proffered "bargain".

The Court specifically finds that the appeal sought herein is frivolous, is not taken in good faith, and does not present a substantial question, and same is therefore denied and the Court declines to issue a Certificate of Probable Cause herein.

This the 19th day of December, 1975.

BERNARD T. MOYNAHAN, JR.

Bernard T. Moynahan, Jr., Judge

NO. 76-8006

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL LEWIS HAYES,
Petitioner-Appellant

V. ORDER

HENRY COWAN, Warden,
Respondent-Appellee

The court treating the notice of appeal filed by the petitioner as an application for certificate of probable cause, an application having been previously made to the district court and having been denied, upon consideration.

IT IS ORDERED that said application be and it is hereby granted.

/s/ Albert J. Engel,

Albert J. Engel,
Circuit Judge

NO. 76-1409

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL LEWIS HAYES,
Petitioner-Appellant,

V.

HENRY COWAN, Warden,
Respondent-Appellee.

APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed December 30, 1976.

Before: PECK, McCREE, and LIVELY, Circuit Judges.

McCREE, Circuit Judge. This is an appeal from the denial of a petition for habeas corpus challenging confinement based on Hayes' conviction of being an habitual criminal under Kentucky's recidivist statute, K.R.S. §431.190.[1] The district court referred the petition to a magis-

[1]At the time of appellant's conviction the statute provided:

> Conviction of felony; punishment on second and third offenses. Any person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall

trate to determine whether leave to proceed *in forma pauperis* should be granted pursuant to 28 U.S.C. §1915(a). Although the magistrate ordered the petition filed and determined that petitioner's claims were not so frivolous that *in forma pauperis* leave should not be granted, nevertheless, he concluded that the contentions made were "patently without merit" and recommended that the petition be dismissed. The district court adopted the magistrate's conclusions and, instead of issuing an order to the respondent to show cause as provided in 28 U.S.C. §2243, it dismissed the petition on the grounds that the mandatory life sentence imposed for the habitual criminal conviction did not constitute cruel and unusual punishment, that petitioner had not been arbitrarily selected for prosecution as an habitual criminal, and that the state prosecutor's decision to seek an habitual criminal indictment when petitioner refused to plead guilty to the charge of forgery in return for a recommendation of a five-year sentence was not an unconstitutional implementation of plea bargaining.

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not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.

It has since been repealed. According to §532.080, which now regulates " persistent felony offender sentencing," the special sentence may be imposed only if, for each of two previous felony convictions, the sentence was at least one year; defendant was imprisoned under each such sentence before commission of the instant felony; and the offender was over eighteen years of age at the time he committed each offense. Petitioner would not have been subjected to enhanced sentencing under §532.080, because none of these conditions were satisfied.

We issued a certificate of probable cause to permit an appeal when the district court, determining that an appeal would be frivolous and not taken in good faith, declined to do so. Because we conclude that petitioner was denied the due process of law by the prosecutor's tactics, we reverse.

The facts which led to petitioner's conviction and incarceration are not disputed.[2] On January 8, 1973, he was indicted for forgery of a check in the amount of $88.30 by a Fayette County, Kentucky grand jury. After arraignment, a pretrial conference was held with the state prosecutor. During this conference, the prosecutor offered to recommend a five-year sentence if Hayes would plead guilty. Petitioner was warned that if he did not plead guilty, he would be charged under the habitual criminal statute. He refused to plead guilty, but insisted on receiving a full trial. The prosecutor thereupon returned to the grand jury, and on January 29, 1973, obtained a new indictment charging petitioner under the habitual criminal statute based upon the forgery as a third offense. Petitioner was convicted by a jury, and

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[2]These facts were admitted by the prosecutor during his cross-examination of appellant at the sentencing trial:

> . . . isn't it a fact that I told you if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?

on the instructions of the judge, the mandatory life sentence for a third offense habitual criminal was imposed.[3]

We recognize that plea bargaining now plays an important role in our criminal justice system. In *United States* v. *Brady*, 397 U.S. 742, 752 (1970), the Supreme Court approved the practice, and stated that plea bargaining helps to conserve judicial and prosecutorial resources in cases in which there is no substantial issue about the defendant's guilt. The Court has recognized, however, that there are limits to the tactics that a prosecutor may use in bargaining with defendants. See *Santobello* v. *New York*, 404 U.S. 257 (1971). The Court has not yet had an opportunity to explore fully these limits, particularly in cases such as this, "where the prosecutor . . . deliberately employ[ed his] charging . . .

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[3]We expressed our disapproval of such practices in **Cunningham** v. **Wingo**, 443 F. 2d 195, 198 n.1 (1971). In that case we noted the findings of the President's Commission of Law Enforcement and Administration of Justice in **The Challenge of Crime in a Free Society** (1967):

> "At the same time the negotiated plea of guilty can be subject to serious abuses. In hard-pressed courts, where judge and prosecutors are unable to deal effectively with all cases presented to them, dangerous offenders may be able to manipulate the system to obtain unjustifiably lenient treatment. There are also real dangers that excessive rewards will be offered to induce pleas **or that prosecutors will threaten to seek a harsh sentence if the defendant does not plead guilty**. Such practices place unacceptable burdens on the defendant who legitimately insists upon his right to trial. * * *" (Emphasis supplied.)

powers to induce a particular defendant to tender a plea of guilty." *Brady, supra,* at 751 n.8. But it is clear that the legitimate purposes of plea bargaining are not served if a prosecutor abuses his powers in order to coerce an unwilling defendant into foregoing his constitutional right to trial.

The Supreme Court has held that defendants who assert procedural rights must be treated in a way that avoids any suggestion of vindictive or retaliatory motive. In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Court held that a defendant may not be subjected to a more severe penalty on retrial after a successful collateral attack against a conviction. The Court reasoned that due process requires that a defendant be free from fear of retaliatory action when he asserts procedural rights. Therefore a defendant may not be dealt with more harshly on retrial unless the permissible reasons therefor affirmativly appear.

In *Blackledge* v. *Perry*, 417 U.S. 21 (1974), the Court applied the rule expressed in *Pearce* to protect defendants from the vindictive exercise of a prosecutor's discretion. In that case, a defendant in a misdemeanor prosecution had asserted his right to a trial de novo on appeal. Before the new trial, the prosecutor obtained a felony indictment against the defendant. The Court held that this tactic, if allowed, would deter defendants from asserting their procedural rights. The Court emphasized that the prosecution should not be allowed to behave in a manner that even suggests a retaliatory motive.

The concerns expressed in *Blackledge* have persuaded several lower courts to limit the prosecutor's dis-

cretion in related situations. In *United States* v. *Jamison*, 505 F. 2d 407 (D.C. Cir. 1974), the court reversed a conviction of first degree murder obtained after the defendants had been granted a mistrial during an earlier trial based on an indictment for second degree murder. In *United States* v. *DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975), the court refused to allow prosecution of an indictment obtained after a defendant had asserted his right to a change of venue of a trial on an indictment charging less serious offenses. In *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (9th Cir. 1976), the court held that a defendant cannot be tried on a felony indictment after he has refused to plead guilty to a misdemeanor, if no justification of the increase in severity of the charges is offered. See also *United States* v. *Gerard*, 491 F.2d 1300 (9th Cir. 1974); *United States* v. *Butler*, 515 F. Supp. 394 (D. Conn. 1976); *Sefchek* v. *Brewer*, 301 F. Supp. 793 (D. Iowa 1969).

We hold that a similar potential for impermissible vindictiveness exists when a prosecutor is allowed to bring an habitual offender indictment against a defendant who has refused to plead guilty to an indictment for the same unenhanced substantive offense. In this case the prosecutor does not assert that any event occurred between the issuance of the first indictment and the issuance of the second to influence his decision except petitioner's insistence upon his right to trial. There is no indication that the prosecutor, had he thought such an indictment proper, could not have included the habitual criminal charges in the original indictment.

The Commonwealth urges that the entire concept of

plea bargaining will be destroyed if prosecutors are not allowed to seek convictions on more serious charges if defendants refuse to plead guilty. We do not agree. Although a prosecutor may in the course of plea negotiations offer a defendant concessions relating to prosecution under an existing indictment, see *United States ex rel. William* v. *McMann*, 436 F. 2d 103 2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971), he may not threaten a defendant with the consequence that more severe charges may be brought if he insists on going to trial. When a prosecutor obtains an indictment less severe than the facts known to him at the time might permit, he makes a discretionary determination that the interests of the state are served by not seeking more serious charges. Cf. *United States* v. *Johnson*, 537 F. 2d 1170 (4th Cir. 1976). Accordingly, if after plea negotiations fail, he then procures an indictment charging a more serious crime, a strong inference is created that the only reason for the more serious charges is vindictiveness. Under these circumstances, the prosecutor should be required to justify his action. In this case, a vindictive motive need not be inferred. The prosecutor has admitted it.

Therefore we hold that due process has been offended by placing petitioner in fear of retaliatory action for insisting upon his constitutional right to stand trial. Accordingly, the dismissal of the petition is reversed and the case is remanded with instructions to order petitioner's discharge except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument.

UNITE DSTATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-1409

PAUL LEWIS HAYES
PETITIONER-APPELLANT

V. MOTION FOR STAY OF MANDATE

HENRY COWAN, Warden
RESPONDENT-APPELLEE

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF KENTUCKY AT LEXINGTON

Respondent-Appellee, by counsel, respectfully presents this application for, and moves the Court to enter, an order staying the issuance of the mandate in this case pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure for thirty (30) days because it is the intention of Respondent-Appellee to make proper and timely application to the Supreme Court of the United States for

writ of certiorari to review the decision of the Sixth Circuit in the above-styled action.

Respectfully submitted,

ROBERT F. STEPHENS
ATTORNEY GENERAL

By: ROBERT L. CHENOWETH
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR
RESPONDENT-APPELLEE

NOTICE

Please take notice that the foregoing Motion will be filed with the Clerk of the United States Court of Appeals for the Sixth Circuit by mailing an original and three copies thereof this 25th day of January 1977, to be considered at the convenience of the Court.

Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Motion were mailed, postage prepaid, to Honorable J. Vincent Aprile, Assistant Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601 on January 25, 1977.

Assistant Attorney General

FILED FEBRUARY 2, 1977

FOR THE SIXTH CIRCUIT

NO. 76-1409

PAUL LEWIS HAYES

Petitioner-Appellant

V.

HENRY COWAN, WARDEN

Respondent-Appellee

BEFORE: PECK, McCREE and LIVELY, Circuit Judges

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1334

HENRY E. COWAN, Superintendent,
Kentucky State Penitentiary,
Petitioner

V.

PAUL LEWIS HAYES,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC DEFENDER
625 LEAWOOD DRIVE
FRANKFORT, KENTUCKY 40601

COUNSEL FOR RESPONDENT

May 16, 1977

INDEX

Citations

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TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit granting habeas corpus relief to the respondent is reported as Hayes v. Cowan, 547 F.2d 42 (6th Cir. 1976). The order of the Eastern District Court of Kentucky denying habeas corpus relief to the respondent is an unpublished decision. Both opinions are correctly set forth in the Appendix of the petitioner's Petition for Writ of Certiorari (Appendix, hereinafter designated App., pp. 1a-8a; 1d-4d; 1e).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

WHETHER THE COMMONWEALTH'S ATTORNEY IS PROHIBITED FROM BARGAINING FOR A PLEA OF GUILTY BY THREATENING TO BRING AN ADDITIONAL INDICTMENT IF AN ACCUSED DOES NOT ACCEPT A PLEA BARGAIN OFFER.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the 5th, 6th and 14th Amendments to the Federal Constitution.

STATEMENT OF THE CASE

The facts that are relevant to the legal issues in this case are clearly and completely delineated in the opinion of the United States Court of Appeals for the Sixth Circuit (547 F.2d at 42-43; App., pp. 1a-3a). Those same facts are virtually reiterated in petitioner's Statement of the Facts and of the Case.

ARGUMENT

THE COMMONWEALTH'S ATTORNEY IS PROHIBITED FROM BARGAINING FOR A PLEA OF GUILTY BY THREATENING TO BRING AN ADDITIONAL INDICTMENT IF AN ACCUSED DOES NOT ACCEPT A PLEA BARGAIN OFFER.

Although petitioner initially suggests that the "important constitutional question presented by this case . . . has not been. . .decided by this Court," respondent submits that the decision of the circuit court in the case sub judice was in absolute conformity with the constitutional principles enunciated by this Court in comparable situations.

This Court has previously held that defendants in criminal cases who assert procedural rights must be treated in a manner that avoids any suggestion of vindictive or retaliatory motive. In North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), this Court examined the issue

2

of whether a trial court can impose a more severe sentence upon retrial and reconviction after an accused has successfully challenged his first conviction on appeal. This Court held that, although more severe sentences are not absolutely prohibited, due process requires that the reasons for imposing such sentences upon retrial must affirmatively appear so that an accused may be free, when taking an appeal, of any apprehension of subsequently retaliatory or vindictive sentencing because of his successful appeal. Id., 395 U.S. at 725-26.

In Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), this Court extended the rule in Pearce to protect the accused against the apprehension of prosecutorial vindictiveness. Perry the accused in Blackledge, was initially charged with a misdemeanor assault with a deadly weapon for an altercation with another inmate which occurred while Perry was incarcerated in prison. After he was convicted in an inferior court in North Carolina and given a sentence of six months confinement, Perry chose to exercise his right under North Carolina law to a trial de novo in the Superior Court. Prior to the inception of the trial de novo, the prosecution obtained an indictment charging Perry with a felony for the same acts for which he had previously been charged with a misdemeanor. The net result was an increase of eleven months in Perry's sentence.

Noting that prosecutors have a "considerable stake" in discouraging new trials, this Court observed that "if the prosecutor has the means readily at hand to discourage such appeals by 'upping the ante' . . . the State can insure that only the most hardy defendants will brave the hazards of a de novo trial." Id., 417 U.S. at 27-28. Consequently, this Court held "that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo." Id., 417 U.S. at 28-29.

This Court in Blackledge reasoned that when the circumstances "pose a realistic likelihood of 'vindictiveness' . . . due process of law requires a rule analagous to that of the Pearce case." Id., 417 U.S. at 27.

Pearce and Blackledge therefore establish that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not attributable to a vindictive motive. United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976).

According to the circuit court in the case sub judice, "[t]he concerns expressed in Blackledge have persuaded several lower courts to limit the prosecutor's discretion in related situations." Hayes v. Cowan, 547 F.2d 42, 44 (6th Cir. 1976), citing United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974); United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976); United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974); United States v. Butler, 414 F.Supp. 394 (1976); Sefchek v. Brewer, 301 F.Supp. 793 (1969).

Following the constitutional principles enunciated by this Court in Pearce and Blackledge, both supra, as well as their application by lower federal courts in comparable factual situations. the circuit court in the instant case held "that a similar potential for impermissible vindictiveness exists when a prosecutor is allowed to bring an habitual offender indictment against a defendant who has refused to plead guilty to an indictment for the same unenhanced substantive offense." Hayes v. Cowan, supra, at p. 44. The circuit court below concluded that "due process" was "offended by placing [Hayes] in fear of retaliatory action for insisting upon his constitutional right to stand trial" and ruled that Hayes' enhanced punishment

as an habitual offender must be vacated as the product of an unconstitutional action by the prosecutor. Id., at p. 45.

Accordingly, respondent submits that the decision of the circuit court in the case at bar is in complete conformity with the constitutional principles enunciated by this Court in Pearce and Blackledge, both supra. Since the decision in respondent's case involves only the application of previous decisions of this Court to a particular fact situation, the case at bar presents no important question of federal law which has not been settled by this Court.

Petitioner contends that the decision of the circuit court in the case sub judice "severely errodes the role of plea bargaining in the administration of criminal justice" since "a prosecutor may not seek an additional indictment, specifically under an enhancement statute, if an accused chooses to stand trial rather than plead guilty to an offer made by the prosecutor on the original charge."

This Court should note that in his Statement of the Facts and of the Case, petitioner candidly concedes that the respondent's "refusal to plead guilty [to the unenhanced forgery indictment] clearly lead to his indictment under the habitual criminal statute." Nevertheless, petitioner suggests that this action by the prosecutor "is no more vindictive than is any other aspect of the plea bargaining process and that the leverage which may be applied by a prosecutor. . . does not impose any unconstitutional penalty for the assertion of rights by one accused of a felony."

In an endeavor to substantiate this argument, petitioner unequivocally asserts that "[t]he state to some degree acts in a coercive and vindictive manner at every important step in the criminal process." This statement by petitioner appears to be a pejorative paraphrase of this Court's observation in Brady v. United States, 397 U.S. 742, 750, 90 S.Ct.

1470, 25 L.Ed. 747 (1970), that "[t]he State to some degree encourages pleas of guilty at every important step in the criminal process." Certainly, petitioner misconceives a fundamental distinction between the prosecution's use of opportunity or promise of leniency to influence or encourage a guilty plea and the prosecution's threat of seeking more severe charges if an accused declines to plead guilty and instead asserts his constitutional right to plead not guilty.

Indeed, this Court in Brady, supra, declined to hold that a guilty plea is unconstitutional simply because it is "motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged." Id., 397 U.S. at 751 (emphasis added). However, this Court refused to extend its approval "to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty." Id., 397 U.S. at 751, n. 8.

To justify the admittedly vindictive actions of the prosecutor in the instant case, petitioner has attempted to portray "plea bargaining" as an inherently coercive, vindictive and threatening procedure in which "the prosecutor, not the accused, . . . is in control." Obviously, petitioner's analysis of the normal mode of plea bargaining rejects this Court's observations in Brady, supra, that "both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law." Id., 397 U.S. at 752. According to this Court, "[i]t is this mutuality of advantage that perhaps explains the fact that well over three-fourths of the criminal convictions in this country rest on pleas of guilty." Id. Within such an atmosphere of

"mutuality of advantage," it is obvious that negotiations for a reduced sentence in exchange for a plea of guilty do not, under normal circumstances, "pose a realistic likelihood of vindictiveness." However, when the accused declines the sentence reductions offered by the prosecutor and refuses to plead guilty, a prosecutor's threat to obtain more severe charges against the defendant unless he pleads guilty is undeniably vindictive and retaliatory in motive.

Recognizing the potential for abuse in plea bargaining, the circuit court in the case at bar emphatically observed that "it is clear that the legitimate purposes of plea bargaining are not served if a prosecutor abuses his powers in order to coerce an unwilling defendant into forgoing his constitutional right to trial." Hayes v. Cowan, supra, at 44.

Vowing disapproval of the practice employed by the prosecutor in the instant case, the Sixth Circuit Court of Appeals noted the findings of the President's Commission of Law Enforcement and Administration of Justice in The Challenge of Crime in a Free Society (1967):

> At the same time the negotiated plea of guilty can be subject to serious abuses. . .There are also real dangers that excessive rewards will be offered to induce pleas or that prosecutors will threaten to seek a harsh sentence if the defendant does not plead guilty. Such practices place unacceptable burdens on the defendant who legitimately insists upon his right to trial. . . .(emphasis supplied).

The circuit court below expressed its disagreement with petitioner's argument that "the entire concept of plea bargaining will be destroyed" if prosecutors are precluded from obtaining more severe charges against defendants who refuse to plead guilty. Hayes v. Cowan, supra, at p. 44.

Although acknowledging that "a prosecutor may in the course of plea negotiations offer a defendant concessions relating to prosecution under an existing indictment," the circuit court emphasized that the prosecutor "may not threaten a defendant with the consequences that more severe charges may be brought if he insists on going to trial." Id.

Petitioner argues that since "[t]his Court's holding in Pearce and Blackledge and their lower court progeny all relate to situations dealing with other than plea bargaining," the circuit court's "reliance on these cases relative to procedure in the present case was misplaced." A perusal of the federal decisions cited by the circuit court in the instant case reveals the fallacy of petitioner's attempt to distinguish those cases from the situation at bar.

In United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974), the defendants were first indicted for the offense of second degree murder and their initial trial ended with a declaration of mistrial. They were subsequently reindicted for the offense of first degree murder, found guilty by a jury and appealed. The District of Columbia Court of Appeals held that the reindictment of the defendants for first degree murder denied them due process of law, absent any newly obtained objective information justifying the increase in the degree of the crime charged. The Jamison court concluded "that Pearce and Blackledge require restrictions on increased charges after mistrials." Id., at p. 416.

The circuit court below also cited the federal district court decision in United States v. DeMarco, 401 F.Supp. 505 (C.D. Cal. 1975), and noted that "the court refused to allow prosecution of an indictment obtained after a defendant had asserted his right to a change of venue of a trial on an indictment charging less serious offenses." Hayes v. Cowan, supra, at p. 44. Subsequent to the decision in respondent's

case, the Ninth Circuit Court of Appeals affirmed the federal district court's opinion. United States v. DeMarco, 550 F.2d 1224 (9th Cir. 1977). According to the Ninth Circuit, "[u]nder Pearce and Blackledge, it was not constitutionally permissible for the Government to threaten to "up the ante" to discourage DeMarco from exercising his venue right; a fortiori it was constitutionally impermissible to follow up the threat with the California indictment." Id., 550 F.2d at 1227-28.

In United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976), the court discussed the issue of whether it is constitutionally impermissible for the prosecution to bring a more serious charge against a defendant after the defendant has exercised a constitutional right, a common law right, or a statutory right. In the cited case, the defendant was charged with the misdemeanor offense of unlawful entry in violation of 18 U.S.C. §1325. That statute provides that first offenders are guilty of a misdemeanor, while multiple offenders are guilty of a felony. Although the prosecution was aware that the defendant was a multiple offender, it chose to charge him with a misdemeanor before the magistrate. After pleading not guilty to the misdemeanor, the defendant refused to sign a waiver of his right to be tried by a district judge as well as any right he had to a jury trial. Thereafter, the prosecution obtained a two-count indictment charging the defendant with a felony violation under 8 U.S.C. §1325 as a multiple offender and with a violation of 8 U.S.C. §1326, the felony crime of unlawful reentry. The defendant moved to dismiss the indictment on grounds that the increase in the severity of the charges violated his constitutional due process rights under the Fifth Amendment. However, that motion was denied. After a trial before the District Court, the defendant was found guilty.

The Court in Ruesga-Martinez held:

> Pearce and Blackledge therefore establish, beyond doubt, that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charge was not motivated by a vindictive motive. Id., at p. 1369.

The Court in Ruesga-Martinez also found "no merit in appellee's suggestion that the power of the prosecution to adjust the charges against an accused at will inheres in its power to engage in plea bargaining." Id., at pp. 1370-1371.

As the foregoing trilogy of federal decisions indicates, a prosecutor's reindictment of an accused on more severe charges following the exercise by the defendant of a procedural right calls into play the constitutional principles delineated by this Court in Blackledge. It is of no import that the procedural right is exercised within the context of plea negotiations. Blackledge and Pearce each establish "a prophylactic rule imposing limits upon prosecutorial discretion in seeking new indictments or in conducting retrials when such actions carry with them the opportunity of retaliation." United States v. DeMarco, supra, 550 F.2d at 1227. The prophylactic rule "is designed not only to relieve the defendant who has asserted his right from bearing the burden from 'upping the ante' but also to prevent chilling the exercise of such rights by other defendants who must make their choices under similar circumstances in the future." Id.

Accordingly, the decision of the circuit court in the instant case to apply the constitutional safeguards of Pearce and Blackledge to the prosecutor's admittedly vindictive and retaliatory reindictment of respondent, following the breakdown of plea negotiations, is in complete conformity with this Court's past decisions and serves to insure the integrity of the plea bargaining process as well as the free exercise of constitutional rights.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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ASSISTANT DEPUTY PUBLIC DEFENDER
625 LEAWOOD DRIVE
FRANKFORT, KENTUCKY 40601

J. Vincent Aprile II

COUNSEL FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1334

HENRY E. COWAN, Superintendent,
Kentucky State Penitentiary,
Petitioner

V.

PAUL LEWIS HAYES,
Respondent

CERTIFICATE OF SERVICE

I, J. Vincent Aprile, II, Counsel for respondent, hereby certify that the attached Brief for Respondent in Opposition, Motion for Leave to Proceed in Forma Pauperis, Affidavit of Indigency, and Notice of Appearance were served on petitioner by hand delivering copies of the aforementioned documents, on May 16, 1977, to respondent's counsel, Robert L. Chenoweth, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

J. Vincent Aprile, II

J. VINCENT APRILE, II
ASSISTANT DEPUTY PUBLIC DEFENDER
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES

COUNSEL FOR RESPONDENT

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1334

DON BORDENKIRCHER, SUPERINTENDENT
KENTUCKY STATE PENITENTIARY ..... PETITIONER

V.

PAUL LEWIS HAYES ..... RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

ROBERT F. STEPHENS
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INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

in The

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October Term, 1976

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V.

PAUL LEWIS HAYES ..... RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

MAY IT PLEASE THE COURT:

OPINION BELOW

The judgment and order of the United States Court of Appeals for the Sixth Circuit in this case is reported as *Hayes* v. *Cowan*, 547 F. 2d 42 (6th Cir. 1976). The opinion and order are set out in full in the Appendix to the Briefs, hereafter "App.," at pages 83-89.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on December 30, 1976. The petition for a writ of certiorari was filed on March 28, 1977, and was granted on June 6, 1977. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTION PRESENTED

WHETHER THE COMMONWEALTH'S ATTORNEY IS PROHIBITED FROM BARGAINING FOR A PLEA OF GUILTY BY THREATENING TO BRING AN ADDITIONAL INDICTMENT IF AN ACCUSED DOES NOT ACCEPT A PLEA BARGAIN OFFER.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the Fifth, Sixth and Fourteenth Amendments. The text of these Amendments is set forth in an addendum to this brief.

STATEMENT OF THE CASE

The facts which led to Paul Lewis Hayes' conviction and incarceration are not disputed. Hayes, respondent herein, was indicted by the Fayette County Grand Jury, Lexington, Kentucky, on January 8, 1973, for the charge of uttering a forged instrument under Kentucky Revised Statute (KRS) 434.130. After arraignment, pretrial conferences were held with the Commonwealth's attorney on January 24 and 26, 1973. During these conferences the

prosecutor offered to recommend a five-year sentence if Hayes would plead guilty to uttering a forged instrument. Conviction for uttering a forged instrument carried a penalty of from two to ten years in prison. Hayes was told that if he did not plead guilty, he would be charged under the then Kentucky Habitual Criminal Act, KRS 431.190[1]. Hayes chose not to plead guilty.

The prosecutor thereupon returned to the grand jury on January 29, 1973, and obtained an indictment charging Hayes under the Habitual Criminal Act.

A bifurcated trial was held in the Fayette Circuit Court, Lexington, Fayette County, Kentucky, on April 19-20, 1973, and a conviction was returned on both the principal charge and as an habitual criminal. As required by the habitual criminal statute where conviction is had on the principal charge and of having twice before been convicted of felonies, Hayes was sentenced to life in the penitentiary.

At the beginning of the second phase of the trial for consideration under the habitual criminal indictment, Hayes on his own objected to the manner in which he had been indicted on the habitual criminal charge. The facts concerning this matter were admitted by the prosecutor during his cross-examination of Hayes at the trial. The prosecutor said:

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[1]**The text of KRS 431.190 is set forth in the addendum to this brief. This statute has been repealed. The Kentucky Penal Code provision dealing with persistent felony offenders is KRS 532.080 which is also set forth in the addendum to this brief.**

> "[I]sn't it a fact that I told you if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?"

See App. 50. Hayes' refusal to plead guilty clearly lead to his indictment under the habitual criminal statute.

The issue involved in the petition for certiorari of whether the Commonwealth's attorney, as the representative of the state, is prohibited from bargaining for a plea of guilty by threatening to bring an additional indictment if an accused does not accept a plea bargain offer, was raised on direct appeal by Hayes to the Kentucky Court of Appeals, the then highest appellate court in the Commonwealth. Hayes argued that his Fifth, Sixth and Fourteenth Amendment rights were abridged by the prosecutor's action in bringing the habitual criminal charge. The Kentucky Court of Appeals affirmed Hayes' conviction on March 1, 1974, in an unreported memorandum opinion saying Hayes had risked the maximum sentence of life imprisonment for a sentence of five years and that he "cannot now complain of his bad bargain." See App. 53-57.

A Petition for a Writ of Habeas Corpus was filed on June 11, 1975, in the United States District Court for the Eastern District of Kentucky. A Magistrate's Report and Recommendation was also filed on June 11, 1975, wherein the opinion was that the petition was "patently without merit." See App. 58-62; 70-73.

On September 9, 1975, Judge Bernard T. Moynahan, Jr., entered an order adopting the Magistrate's Report and

Recommendation and thereby denied the Petition for Writ of Habeas Corpus. See App. 75.

After an Application for Certificate of Probable Cause was filed in the United States District Court on October 9, 1975, Judge Moynahan entered an order on December 19, 1975, declining to issue a Certificate of Probable Cause and specifically finding that the appeal sought was frivolous, not taken in good faith, and not presenting a substantial question. See App. 79-81.

An appeal was taken to the Sixth Circuit Court of Appeals. In an opinion rendered December 30, 1976, the Sixth Circuit held that the Commonwealth had violated Hayes' due process rights by placing him in fear of retaliatory action for insisting on his constitutional rights to stand trial before a jury. It is from this order of the United States Court of Appeals for the Sixth Circuit that a review is sought.

SUMMARY OF ARGUMENT

This case involves a current bargaining practice used in plea discussions. It is the petitioner's position that the realities of plea discussions involving charges unbrought but legally susceptible of being brought is that it is entirely appropriate, legally and constitutionally, for the prosecutor to offer to the accused not to seek indictments on the additional charges for a plea of guilty to a charge already brought.

The inevitable effect of plea bargaining is to discourage the assertion of the Fifth Amendment right not to plead guilty and to deter the exercise of the Sixth Amend-

ment right to demand a jury trial. There is no arguable constitutional problem with the fact that an accused faced with plea discussions has to choose whether to exercise his Fifth and Sixth Amendment rights or that a greater sentence will most likely be imposed on a defendant who is convicted after trial than on the defendant who pleads guilty.

It is recognized that certain practices of plea bargaining are not permitted. In considering what a prosecutor may do to induce a plea of guilty it must be remembered that the role of the prosecutor is that of the natural adversary of the defendant. A prosecutor should be at liberty to induce pleas of guilty through plea discussions by accepting pleas to selected counts, to lesser included offenses, for recommendations to sentence, or to reduced charges, dismissal of other charges or potential charges against a defendant.

In the present case before the Court, the respondent herein, Paul Lewis Hayes, had been indicted for uttering a forged instrumnt which charge carried a possible two to ten-year sentence. The prosecutor had overwhelming evidence of Hayes' guilt. Hayes was offered five years for a plea of guilty to the uttering charge and refused it. Thereafter the prosecutor went back to the grand jury and obtained an indictment under the then habitual criminal statute for two prior felony convictions. Hayes was convicted on the uttering charge and under the enhancement statute and sentenced to life in the penitentiary.

After a direct appeal to the highest appellate court in the Commonwealth and an unsuccessful seeking of habeas corpus relief in the federal district court, the United States

Court of Appeals for the Sixth Circuit found the practice of plea bargaining used in this case unconstitutional under the Fourteenth Amendment due process doctrine of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974)

It is submitted that the Sixth Circuit misapplied the reasoning and technique of this Court's decisions of *North Carolina* v. *Pearce* and *Blackledge* v. *Perry* to the facts and practice involved in the present case now before this Court. The Sixth Circuit's decision in the present case illogically applied the principle announced in *North Carolina* v. *Pearce*, even as extended to prosecutorial conduct in *Blackledge* v. *Perry*, to a situation far removed from the problem for which the principle was designed, and the lower federal court decisions cited by the Sixth Circuit illustrate this misapplication.

The application of a prophylactic rule to the plea bargaining practice in this case does not square when the realities of various practices of plea bargaining are analyzed. The end result of the procedure used by the prosecutor in this case was no more vindictive so as to impose an impermissible burden upon the assertion of trial rights than is the frequent situation where a prosecutor indicts on a principal charge and also under an enhancement statute and then bargains for a plea of guilty to the principle charge on the promise the prosecutor will make a motion to drop the habitual criminal charge.

There are good reasons for not indicting on an enhancement charge in the first instance and these reasons work to the advantage of the accused rather than the pro-

scutor. For example, if there is no enhancement charge, the amount set for bail will usually be significantly less.

For the above reasons the petitioner believes that a prosecutor may constitutionally seek an additional indictment, specifically under an enhancement statute, if an accused chooses to stand trial rather than plead guilty to an offer made by the prosecutor on the original charge.

ARGUMENT

THE COMMONWEALTH'S ATTORNEY IS NOT PROHIBITED FROM BARGAINING FOR A PLEA OF GUILTY BY THREATENING TO BRING AN ADDITIONAL INDICTMENT IF AN ACCUSED REJECTS A PLEA BARGAIN OFFER.

This case involves the "venerable institution of plea bargaining." *Parker* v. *North Carolina*, 397 U.S. 790, 808 (1970). The petitioner asks this Court to review a current bargaining practice used in plea discussions. It is our position that the bargaining practice evident in this case does not suffer any constitutional taint. We believe the realities of plea discussions involving charges unbrought but legally susceptible of being brought is that it is entirely appropriate, legally and constitutionally, for the prosecutor to offer to the accused not to seek indictments on the additional charges for a plea of guilty to a charge already brought.

Plea bargaining has been defined as "a process of negotiation in which the prosecutor offers the defendant certain concessions in exchange for a guilty plea." *The Unconstitutionality of Plea Bargaining*, 83 Harv. L. Rev. 1387, 1389 (1970). To some the very words "plea bar-

gaining" carry with them an evil connotation and such phrases as "plea discussions" and "plea agreements" are preferred in reference to discussions between the prosecutor and defense counsel or defendant concerning the plea and to the understanding which is reached as a result of these discussions. See American Bar Association, *Standards Relating to Pleas of Guilty* (Commentary, Section 3.1(a), Approved Draft 1968). No matter what phrase one uses to describe it or how well one likes or despises it, the negotiation of pleas of guilty plays an important function in our criminal justice system. However, as Mr. Justice Stewart wrote in the recent case of *Blackledge v. Allison*, 45 U.S.L.W. 4435, 4437 (May 2, 1977):

> "Only recently has plea bargaining become a visible practice accepted as a legitimate component in the administration of criminal justice. For decades it was a *sub rosa* process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges. Indeed, it was not until our decision in *Santobello v. New York*, 404 U.S. 257, that lingering doubts about the legitimacy of the practice were finally dispelled."

In *Santobello* v. *New York*, 404 U.S. 257, 260 (1971), Mr. Chief Justice Burger in delivering the opinion of the Court stated: "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged." Mr. Chief Justice Burger went on in *Santobello* to speak of the desirable reasons for plea discussions (404 U.S. 261):

> "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative propects (sic) of the guilty when they are ultimately imprisoned." (Citation reference omitted.)

Another court has stated that the reason plea bargaining is sanctioned is because without it the system of criminal justice could not function effectively and that even with plea bargaining, there are "severe backlogs, scarce judicial resources, and overworked attorneys" and that the "perceptions as to the desirability of plea bargaining are no doubt influenced by pragmatic considerations." *United States* v. *DeMarco*, 401 F. Supp. 505, 511 (C.D.Ca. 1975). Simply put, then, the chief virtues of the plea system are "speed, economy, and finality." See *Blackledge* v. *Allison*, 45 U.S.L.W. 4435, 4438 Bluntly put, plea bargaining serves to avoid utilizing the jury trial system established by the United States Constitution.

The constitutional protections of trial include the Fifth Amendment privilege against self-incrimination, in the context of plea bargaining referred to as the right not to plea guilty, and the Sixth Amendment rights to trial by jury, to compulsory process for obtaining favorable witnesses, and to confront one's accusers. The inevitable effect of plea bargaining, then, is always to discourage the assertion of the Fifth Amendment right not to plead guilty and to deter the exercise of the Sixth Amendment right to demand a jury trial. See *United States* v. *Jackson*, 390 U.S. 570, 581 (1968). However, there can be no per se violation of an accused's constitutional rights through plea bargaining because if it was, the "venerable institution" itself would have to be done away with.

This Court has made clear that the Constitution does not forbid every state imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights. See *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30 (1973), citing *Brady* v. *United States*, 397 U.S. 742 (1970), *Parker* v. *North Carolina*, 397 U.S. 790 1970), and *North Carolina* v. *Alford*, 400 U.S. 25 (1970). Mr. Justice Powell, in *Chaffin*, further commented on this matter that: (412 U.S. 30-31)

> "Brady is particularly instructive. The Court there canvassed several common plea-bargaining circumstances in which the accused is confronted with the 'certainty or probability' that, if he determines to exercise his right to plead innocent and to demand a jury trial, he will receive a higher sentence than would have followed a waiver of those rights. 397 U.S., 751, 25 L.Ed. 2d 747. Although every circumstance has a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices was upheld as an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas."

Mr. Justice Powell continued, quoting from Mr. Justice Harlan's opinion for the Court in *Crampton* v. *Ohio,* a companion case to *McGautha* v. *California,* 402 U.S. 183, 213 (1971): (412 U.S. 32)

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."

Thus, there is no arguable constitutional problem with the fact that an accused faced with plea discussions has to choose whether to exercise his Fifth and Sixth Amendment rights or that a greater sentence will most likely be imposed on a defendant who is convicted after trial than on the defendant who pleads guilty. Moreover, it is quite clear that if an accused does decide to waive his Fifth and Sixth Amendment rights after plea negotiation, such a plea must be measured against the requirements of *Boykin* v. *Alabama,* 395 U.S. 238 (1969), and its progeny from this Court, and in federal criminal cases, of Federal Rule of Criminal Procedure 11.

Because of the desirable reasons for engaging in plea bargaining, it is admitted that prosecutors attempt to structure a criminal case so that a defendant will choose not to go to trial. The American Bar Association, in its *Standards Relating to Pleas of Guilty* (Approved Draft 1968), at Section 3.1, page 60, sets forth standards relating to the propriety of plea discussions and plea agreements. Section 3.1 reads as follows:

"3.1 Propriety of plea discussions and plea agreements.

(a) In cases in which it appears that the interest of the public in the effective administration of criminal justice (as stated in section 1.8) would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He should engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel.

(b) The prosecuting attorney, in reaching a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:

(i) to make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;

(ii) to seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to defendant's conduct; or

(iii) to seek or not to oppose dismissal of other charges *or potential charges against the defendant* if the defendant enters a plea of guilty or nolo contendere.

(c) Similarly situated defendants should be afforded equal plea agreement opportunities." (Emphasis supplied.)

It is recognized that while plea bargaining is worthwhile and has been sanctioned by the American Bar Association, there are certain forms or practices of plea bargaining that are not permitted. Chief Justice Burger, in *Santobello* v. *New York*, 404 U.S. 257, 265-266 (1971), stated that "a guilty plea is rendered voidable by threatening physical harm, . . . , threatening to use false testimony, . . . , threatening to bring additional prosecutions, . . . , or by failing to inform a defendant of his right of counsel." The agents of the State may not produce a plea "by mental coercion overbearing the will of the defendant." *Brady* v. *United States*, 397 U.S. 742, 750 (1970). Neither, we believe, may a prosecutor induce a particular defendant to tender a plea of guilty by "threatening prosecution on a charge not justified by the evidence. . . ." *Brady*, at 751, footnote 8. But in considering what a prosecutor may do to induce a plea of guilty it must be remembered that the role of the prosecutor is that of the natural adversary of the defendant. See *Blackledge* v. *Perry*, 417 U.S. 21, 33 (1974), Mr. Justice Rehnquist, dissenting. One of the prosecutor's "traditional functions has been that of determining society's interest in individual cases, as manifested by the long-recognized discretion of the prosecutor in determining whether to charge and *what to charge*." (Emphasis supplied.) See ABA *Standards Relating to Pleas of Guilty*, Commentary to Section 3.1(a), at page 63; and Note, *Guilty Plea Bargaining: Compromises By Prosecutors to Secure Guilty Pleas*, 112 U.Pa.L.Rev. 865, 879 (1964). As an extension of that discretion, in the context of plea bargaining, a prosecutor should be at liberty to induce pleas of guilty through plea discussions by accepting pleas to selected counts, to lesser included offenses,

for recommendations as to sentence, or to reduced charges, dismissal of other charges or potential charges against a defendant. See *Brady* v. *United States*, 397 U.S. 742, 753, (1970), and ABA *Standards Relating to Pleas of Guilty*, Section 3.1(b)(iii), at page 60.

The exercise of discretion of the prosecutor and practice of plea bargaining involved in the present case consisted of several promises. Hayes had been indicted for uttering a forged instrument which carried a possible two to ten-year sentence. The prosecutor had very strong evidence of Hayes' guilt of this charge. See the Memorandum Opinion of the Kentucky Court of Appeals, the then highest appellate court in the Commonwealth. App. 53-57. The prosecutor, in plea discussions with Hayes, who had counsel, offered to seek a sentence of five years in the penitentiary if Hayes would enter a plea of guilty to the uttering a forged instrument charge. Hayes chose to reject the prosecutor's offer. In turn the prosecutor threatened to do that which had not at that time been done — seek an indictment on the charge within his discretion to be brought, that was, for Hayes to be considered as an habitual criminal. The prosecutor did not lack the power nor was he statutorily prohibited from going back to the grand jury for an indictment on the habitual criminal charge. At all times the only question confronting Hayes was whether or not to exercise his trial rights. Confronted with the choice of entering a plea of guilty on the charge of uttering a forged instrument with a five-year sentence recommendation by the prosecutor in the offing or going to trial on the uttering charge *and* the habitual criminal charge, the situation he was subject of being placed in from the beginning, Hayes unreasonably chose, in view of

the overwhelming evidence against him, to stand trial before a jury. Hayes was found guilty of the uttering of a forged instrument and as required by the then habitual criminal statute, with two prior felony convictions, was sentenced to life imprisonment. It is the petitioner's position that the prosecutor could constitutionally seek any charge permissible by law, including under the enhancement statute after rejection of the plea offer by Hayes.

The issue presented by this case is whether Hayes should have been entitled to exercise his prerogative not to plead guilty and go to trial without being confronted with the prosecutor seeking an indictment carrying with it the possibility of a greater sentence after the plea discussions broke down. The position of the United States Court of Appeals for the Sixth Circuit on this issue was that a prosecutor may not constitutionally seek an additional indictment, specifically under an enhancement statute, if an accused chooses to stand trial rather than plead guilty to an offer made by the prosecutor on the original charge. The Sixth Circuit's finding of the unconstitutionality of the plea bargaining practice involved in this case presently before this Court rested upon the Fourteenth Amendment due process doctrine of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974).

The Due Process Clause, as interpreted by this Court in *North Carolina* v. *Pearce* was based upon the question of whether a defendant who had successfully appealed from a state criminal conviction could be sentenced following retrial to a longer sentence than had been originally imposed. The heart of this Court's position with respect to

resentencing following a successful appeal was expressed in the following lines: (395 U.S. at 725-26)

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."

It is very clear that the *North Carolina* v. *Pearce* decision was the progenitor of the decision rendered in *Blackledge* v. *Perry*. In the latter case this Court extended the *North Carolina* v. *Pearce* principle to prosecutorial conduct in a context where the prosecutor had brought greater charges when the defendant therein exercised a North Carolina statutory right to a *de novo* criminal appeal much like that presently authorized in the Commonwealth of Kentucky. This Court concluded in *Blackledge* v. *Perry* that an increase in charges was impermissible and in violation of the defendant's statutory right of appeal. The nub of this Court's due process analysis and the principle of *Pearce* extended in *Blackledge* v. *Perry* is contained in the following lines: (417 U.S. at 27)

> "[T]he Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness' . . . The question is whether the opportunities for vindictiveness in this situation are

such as to impel the conclusion that due process of law requires a rule analagous to that of the *Pearce* case."

Thus, in *Blackledge* v. *Perry* this Court explicitly applied the due process principles of *Pearce* forbidding increased penalties which inhibit the exercise of constitutional rights.

It is submitted that the United States Court of Appeals for the Sixth Circuit misapplied the reasoning and technique of this Court's decisions of *North Carolina* v. *Pearce* and *Blackledge* v. *Perry* to the facts and practice involved in the present case now before this Court. Certainly it should be obvious that the language of this Court in *North Carolina* v. *Pearce* and *Blackledge* v. *Perry* cannot be literally applied to the facts of this case. Concerning Hayes there has been no prior conviction, no appeal from or collateral attack on a prior conviction, no second trial, and only one completed sentencing proceeding. It is recognized that merely because the facts and procedural background of cases are dissimilar to the one under consideration does not prevent the holdings of these cases from applying. But this Court's holdings in *North Carolina* v. *Pearce* and *Blackledge* v. *Perry* involve retaliatory actions by a court or a prosecutor after an attempt to exercise procedural or statutory rights has been made by a defendant. Even assuming this Court's holdings in these two cases do apply regardless of whether an accused "asserts a constitutional right, a common law right, or a statutory right," there exists no right to be bargained with by the prosecutor for a plea of guilty. See *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (9th Cir. 1976). Neither the facts, procedure nor anything else about this present case involving plea bargaining falls within the rationale of *Pearce* and *Blackledge* v. *Perry*.

The United States Court of Appeals for the Sixth Circuit attempted to find support for its analysis and application of the *Pearce* and *Blackledge* v. *Perry* holdings in their decision in the present case, which erodes prosecutors' use of their plea bargaining leverage, by citing as being in accord several lower federal court decisions which have limited the prosecutor's discretion "in related situations." *Hayes* v. *Cowan*, 547 F. 2d 42, 44 (6th Cir. 1976); App. 88. In *United States* v. *Jamison*, 505 F. 2d 407 (D.C. Cir. 1974), the accused had been granted a mistrial on an indictment for second degree murder and thereafter was indicted for first degree murder. The Circuit Court found that the possibility of being charged with and convicted of a more serious crime *on retrial* denied the defendant due process. In *United States* v. *DeMarco*, 401 F. Supp. 505 (C.D.Cal. 1975), affirmed in *United States* v. *DeMarco*, 550 F.2d 1224 (9th Cir. 1977), petition for certiorari pending, No. 76-1671, the prosecutorial conduct found to have been improper involved threats calculated to deter the defendant from exercising his federal statutory venue rights. The federal district court stated in the *DeMarco* case at 401 F. Supp. 511 that "while plea bargaining may be necessary for the effective administration of criminal justice, venue bargaining is hardly a necessary component of the prosecutor's arsenal." In *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (9th Cir. 1976), after being charged with a misdemeanor and pleading not guilty, the defendant refused to sign a document that would have constituted a waiver of his right to be tried by a district judge, instead of a magistrate, and any right that he had to a jury trial. Thereafter a felony indictment was brought against the defendant.

Thus, the petitioner submits that the Sixth Circuit's decision in the present case illogically applied the principle announced in *North Carolina* v. *Parce,* even as extended to prosecutorial conduct in *Blackledge* v. *Perry,* to a situation far removed from the problem for which the principle was designed, and the lower federal court decisions cited by the Sixth Circuit illustrate this misapplication.

The United States Court of Appeals for the Sixth Circuit's decision has instructed how prosecutors may constitutionally use their plea bargaining leverage. The Sixth Circuit arrived at this decision through an application of the *North Carolina* v. *Pearce* and *Blackledge* v. *Perry* principles as the Court believed these two cases have been interpreted to date. Petitioner asks this Court to determine if, considering the plea bargaining practice involved in the present case, there is a need for a prophylactic rule analogous to that set forth in *Pearce* and *Blackledge.* We believe no such rule is warranted and that if the decision of the Sixth Circuit in the present case is allowed to stand, the role of plea bargaining as an effective tool in the administration of criminal justice will have been significantly diminished.

The application of a prophylactic rule to the plea bargaining practice in this case does not square when the realities of various practices of plea bargaining are analyzed. The end result of the procedure used by the prosecutor in this case was no more vindictive so as to impose an impermissible burden upon the assertion of trial rights than is the frequent situation where a prosecutor indicts on a principal charge and also under an enhancement statute and then bargains for a plea of guilty to the principal

charge on the promise the prosecutor will make a motion to drop the habitual criminal charge. The difference between the leverage and impact involved in the present case and that in the procedure noted above is nonexistent. The constitutional rights to be compromised are the same and the stakes for going to trial are the same. The prosecutor is in both situations exercising the same range of options available for leverage to obtain a guilty plea so as to avoid going to trial.[2] On the one hand, the prosecutor, who has the discretion whether to indict on the enhancement charge, seeks an indictment on a principal charge plus the enhancement charge and then seeks a plea of guilty and in return will drop the enhancement charge. On the other hand, the prosecutor indicts on a principal charge and attempts to obtain a guilty plea, holding in reserve the possibility of returning to the grand jury for indictment under the enhancement statute if no guilty plea is obtained. The Sixth Circuit's decision finds in this case that one way of arriving at the same stakes is unconstitutionally vindictively motivated while the other way of arriving at the same point is an accepted practice in the useful process of plea bargaining.

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[2]The Sixth Circuit seemed to hold in an order filed 1-26-77 vacating judgment and remanding to the district court for hearing about prosecutor's conduct in pretrial plea negotiations in **John R. Gaston** v. **Henry E. Cowan, No. 76-1612,** that there is no per se violation of due process if the record shows no more than bringing certain charges against the defendant and then later reindicting under the habitual criminal statute. The absence or the presence of the "threat" is the turning point.

There are good reasons for not indicting on an enhancement charge in the first instance and these reasons work to the advantage of the accused rather than the prosecutor. If there is no enhancement charge the amount set for bail will usually be significantly less. Also, while a prosecutor does not have to offer to enter into plea discussions with an accused, neither does he want to go to trial if that can be avoided. If the prosecutor is going to offer a term of years for the plea of guilty and if the accused has already been indicted under an enhancement statute, the prosecutor must also offer to dismiss the enhancement charge because if a plea of guilty is entered on an enhanced indictment, the only possible punishment would be that called for under the enhancement statute. Thus, even though a prosecutor would rather wait to see if going to trial was unavoidable because plea discussions failed before seeking an indictment under the enhancement statute, the decision of the Sixth Circuit in the present case would compel obtaining a charge under the enhancement statute in the first instance before the grand jury.

Moreover, the unconstitutional vindictiveness alleged to exist in the plea bargaining practice involved in the present case pales when a comparison is made to plea bargaining practices such as offering to amend a felony count to a misdemeanor, but upon rejection of the offer, seeking at trial the maximum penalty permitted for the felony offense. Or, the offer to drop multiple felony counts of an indictment for a plea of guilty upon just one count, but upon rejection of the offer, seeking at trial the maximum penalty permitted on each of felony counts. The whole practice of plea bargaining is coercive. While there is a mutuality of advantages for the prosecutor and the accused

in plea bargaining, the risks involved in plea bargaining rest exclusively upon the accused. If the bargain offered by a prosecutor is not accepted, an accused in the assertion of his trial rights must face the inevitable risk of a harsher penalty upon conviction after a trial. Just as the practice of plea bargaining is not unconstitutional as determined by this Court, neither is the particular plea bargaining practice involved in this case.

The petitioner believes further that it is inescapably necessary to consider this case from the perspective of what the very definite controlling law would be on the situation if Hayes would have chosen to plead guilty and have taken the five years on the uttering of a forged instrument charge rather than having risked facing the habitual criminal charge and the possibility upon conviction of receiving life imprisonment. Clearly such a possibility as this, which could have resulted from the very practice proscribed by the Sixth Circuit, would be found to be constitutionally permissible. A plea of guilty motivated by a desire to avoid harsher punishment has been found to be not involuntary if it is a well-considered, prudent choice of the lesser of two evils. *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970), and *Parker* v. *North Carolina*, 397 U.S. 790 (1970).

CONCLUSION

The petitioner believes that a prosecutor may constitutionally seek an additional indictment, specifically under an enhancement statute, if an accused chooses to stand trial rather than plead guilty to an offer made by the prosecutor on the original charge. The fact that an accused after

rejecting the plea bargain offer must face the risk and in fact realize a harsher penalty upon conviction does not demonstrate a due process violation. For the foregoing reasons set forth in this brief, the petitioner submits the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert L. Chenoweth, one of counsel for petitioner, hereby certify that the foregoing Brief for Petitioner was served on respondent by depositing three copies each of same in the United States mail, first class postage prepaid, this 15th day of July, 1977, addressed to counsel for petitioner, HONORABLE J. VINCENT APRILE, II, Assistant Deputy Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601.

Robert L. Chenoweth

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ADDENDUM

CONSTITUTION OF UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KENTUCKY REVISED STATUTES

431.190 *Conviction of felony; punishment on second and third offenses.*

Any person convicted a second time of felony shall be confined in the penitentiary not less than double time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.

532.080 *Persistent felony offender sentencing.*

(1) When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (6) of this section. When a defendant is charged with being a persistent felony offender, the determination of whether or not he is such an offender and the punishment to be imposed pursuant to subsection (6) of this section shall

be determined in a separate proceeding from the proceeding which resulted in his last conviction. Such proceeding shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose.

(2) A persistent felony offender in the second degree is a person who is more than twenty-one years of age and who stands convicted of a felony after having been convicted of one (1) previous felony. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:

(a) That a sentence to a term of imprisonment of one year or more or a sentence to death was imposed therefor; and

(b) That the offender was over the age of eighteen years at the time the offense was committed, and

(c) That the offender:

1. Completed service of the sentence imposed on the previous felony conviction within five (5) years prior to the date of commission of the felony for which he now stands convicted; or

2. Was on probation or parole from the previous felony conviction at the time of commission of the felony for which he now stands convicted; or

3. Was discharged from probation or parole on the previous felony conviction within five years prior to the

date of commission of the felony for which he now stands convicted.

(3) A persistent felony offender in the first degree is a person who is more than twenty-one years of age and who stands convicted of a felony after having been convicted of two or more felonies. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:

(a) That a sentence to a term of imprisonment of one year or more or a sentence to death was imposed therefor; and

(b) That the offender was over the age of eighteen years at the time the offense was committed; and

(c) That the offender:

1. Completed service of the sentence imposed on any of the previous felony convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted; or

2. Was on probation or parole from any of the previous felony convictions at the time of commission of the felony for which he now stands convicted; or

3. Was discharged from probation or parole on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted.

(4) For the purpose of determining whether a person has two or more previous felony convictions, two or

more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one conviction, unless one of the convictions was for an offense committed while that person was imprisoned.

(5) A person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions of KRS 532.060(2) for the next highest degree than the offense for which convicted. A person who is found to be a persistent felony offender in the second degree shall not be eligible for probation, shock probation or conditional release.

(6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows:

(a) If the offense for which he presently stands convicted as a Class A or Class B felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than twenty years nor more than life imprisonment; or

(b) If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten nor more than twenty years.

(7) A person who is found to be a persistent felony

offender in the first degree shall not be eligible for probation, shock probation, or conditional discharge, nor for parole until having served a minimum term of incarceration of not less than ten years.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1334

DONALD BORDENKIRCHER, Superintendent,
Kentucky State Penitentiary,

Petitioner,

v.

PAUL LEWIS HAYES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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BRIEF FOR RESPONDENT

STATEMENT OF QUESTION PRESENTED

WHETHER THE COMMONWEALTH'S ATTORNEY IS PROHIBITED FROM BARGAINING FOR A PLEA OF GUILTY BY THREATENING TO BRING AN ADDITIONAL INDICTMENT IF AN ACCUSED DOES NOT ACCEPT A PLEA BARGAIN OFFER.

COUNTERSTATEMENT OF THE CASE

The facts that are relevant to the legal issues in this case are clearly and completely delineated in the opinion of the United States Court of Appeals for the Sixth Circuit. *Hayes v. Cowan*, 547 F.2d 42 (6th Cir. 1976); (Appendix, hereinafter designated App., pp. 83-89). As the circuit court below indicated, "[t]he facts which led to [Hayes'] conviction and incarceration are not disputed." *Id.* at 43.

On January 8, 1973 Paul Lewis Hayes, the respondent, was indicted by the Fayette Circuit Court Grand Jury in Lexington, Kentucky for the offense of uttering a forged instrument (App., pp. 7-8).

According to the indictment, Mr. Hayes on or about November 20, 1972 "uttered a forged instrument, a check drawn on the account of Brown Machine Works in the amount of $88.30" in violation of Kentucky Revised Statute (KRS) 434.130 (App., p. 8).[1] After arraignment, pretrial conferences were held with the state prosecutor on January 24 and 26, 1973 (App., pp. 9, 10-11). During these conferences the prosecutor offered to recommend a five-year sentence if Mr. Hayes would plead guilty.[2]

Mr. Hayes was warned that if he did not plead guilty, he would be reindicted under Kentucky's habitual offender statute, KRS

[1]KRS 434.130 authorized that upon conviction of this offense the individual "shall be confined in the penitentiary for not less than two nor more than ten years."

[2]Hayes may well have been skeptical of the advantages of securing the prosecutor's recommendation on sentence. In Kentucky the sentencing judge is not bound by the prosecutor's sentence recommendation reached as a result of a plea negotiation. Even though the judge rejects the prosecutor's recommendation on sentence, the defendant is not entitled to withdraw his guilty plea. *Couch v. Commonwealth*, Ky., 528 S.W.2d 712 (1975).

431.190, and face the possibility of a mandatory life sentence.[3]

These facts were admitted by the prosecutor during his cross-examination of Mr. Hayes at the habitual offender portion of the trial:

> . . . isn't it a fact that I told you if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions? (App., pp. 49-50).

Mr. Hayes refused to plead guilty and, instead, insisted on receiving a full trial. As a result of Mr. Hayes' refusal to accept his offer and plead guilty, the prosecutor returned to the grand jury, and, on January 29, 1973, obtained a new indictment charging Mr. Hayes under the habitual criminal statute with the forgery charge as the third offense (App., pp. 12-13).

Mr. Hayes was convicted by a jury, and on the instructions of the judge, the mandatory life sentence for a third offense habitual criminal was imposed (App., pp. 21-26).

The remaining facts and procedural history are adequately stated in petitioner's Statement of the Case (Petitioner's Brief, hereinafter Brief, pp. 2-5).

[3]At the time of Mr. Hayes' conviction, KRS 431.190 provided:

> Conviction of felony; punishment on second and third offenses. Any person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.

KRS 431.190 has since been repealed. According to KRS 532.080, which now regulates "persistent felony offender sentencing," the special sentence may be imposed only if, for each of two previous felony convictions, the sentence was at least one year; defendant was imprisoned under each such sentence before commission of the instant felony; and the offender was over eighteen years of age at the time he committed each offense. Petitioner would not have been subjected to enhanced sentencing under KRS 532.080, because none of these conditions were satisfied. *Hayes v. Cowan, supra* at 42.

SUMMARY OF ARGUMENT

A defendant charged with a criminal offense is entitled to exercise his constitutional rights without apprehension that the prosecutor will retaliate by reindicting him on a more serious charge with a significantly increased potential period of confinement. Due process guarantees no less.

The potential for impermissible vindictiveness exists when a prosecutor is allowed to bring an enhanced indictment against a defendant who has refused to plead guilty to the unenhanced charge in exchange for the State's offer of leniency. Due process was offended by placing Mr. Hayes in fear of retaliatory action for insisting upon his right to plead not guilty. Consequently, Mr. Hayes' conviction as an habitual offender must be vacated because it is the product of the prosecutor's constitutionally impermissible retaliatory act.

Because a prosecutor has both the motive and means to discourage not guilty pleas, the potential for vindictiveness inherent in the prosecution's charging power requires a prophylactic rule that prohibits the prosecutor from responding to an invocation of a procedural right with a new indictment charging a more serious offense.

Whether tested by a prophylactic rule of "potential vindictivenes" or by the standard of actual vindictiveness, the prosecutor's threat to reindict Mr. Hayes if he refused to plead guilty constituted impermissible vindictiveness and a denial of due process.

Even though a prosecutor is constitutionally permitted to negotiate with a defendant to encourage a guilty plea, his threat to reindict on a more serious charge unless an accused agrees to plead guilty is no less vindictive or retaliatory because it occurs in the context of plea bargaining.

A legitimate system of plea bargaining presupposes fairness in securing agreement between an accused and a prosecutor. The mutuality of advantage, not the fear of retaliatory action by the prosecutor, must be the cornerstone of any acceptable plea bargaining structure.

Accordingly, the decision of the circuit court below to apply constitutional safeguards to the prosecutor's admittedly vindictive and retaliatory reindictment of Mr. Hayes following the breakdown of plea negotiations is in complete conformity with this Court's past decisions and serves to insure the integrity of the plea bargaining process as well as the free exercise of constitutional rights.

ARGUMENT

THE COMMONWEALTH'S ATTORNEY IS PROHIBITED FROM BARGAINING FOR A PLEA OF GUILTY BY THREATENING TO BRING AN ADDITIONAL INDICTMENT IF AN ACCUSED REJECTS A PLEA BARGAIN OFFER.

A. THE PROSECUTOR'S THREAT TO REINDICT RESPONDENT ON A MORE SERIOUS CHARGE IF RESPONDENT EXERCISED HIS CONSTITUTIONAL RIGHT TO PLEAD NOT GUILTY WAS IMPERMISSIBLY VINDICTIVE AND VIOLATIVE OF DUE PROCESS.

Due process of law guarantees that a person charged with a criminal offense "is entitled to pursue" his constitutional rights to plead not guilty and to have a jury trial, "without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." *Blackledge v. Perry*, 417 U.S. 21, 28 (1974), citing *United States v. Jackson*, 390 U.S. 570 (1968).

At every stage of the proceedings, in both state and federal courts, all parties have acknowledged that Paul Lewis Hayes, the respondent, was reindicted and tried as an habitual offender simply because he refused to submit to the prosecutor's threat that such a reindictment would occur unless respondent agreed to plead guilty and to accept the prosecutor's promised sentence

recommendation.

This Court should note that in his Statement of the Case petitioner candidly concedes that the respondent's "refusal to plead guilty [to the unenhanced forgery indictment] clearly lead [sic] to his indictment under the habitual criminal statute" (Brief, p. 4).

Prior to participating in pretrial conferences with the prosecutor, Mr. Hayes faced an unenhanced charge of uttering a forged instrument with a maximum penalty of confinement for ten years. After declining to capitulate to the prosecutor's threat of reindictment, Mr. Hayes found himself facing a mandatory life sentence if convicted as an habitual criminal.

This Court has previously held that defendants in criminal cases who assert procedural rights must be treated in a manner that avoids any suggestion of vindictive or retaliatory motive. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), this Court examined the issue of whether a trial court can impose a more severe sentence upon retrial and reconviction after an accused has successfully challenged his first conviction on appeal. This Court held that, although more severe sentences are not absolutely prohibited, due process requires that the reasons for imposing such sentences upon retrial must affirmatively appear so that an accused may be free, when taking an appeal, of any apprehension of subsequently retaliatory or vindictive sentencing because of his successful appeal. *Id.* at 725-26.

In *Blackledge, supra*, this Court extended the rule in *Pearce* to protect the accused against the apprehension of prosecutorial vindictiveness. Perry, the accused in *Blackledge*, was initially charged with a misdemeanor assault with a deadly weapon for an altercation with another inmate which occurred while Perry was incarcerated in prison. After he was convicted in an inferior court in North Carolina and given a sentence of six months confinement, Perry chose to exercise his right under North Carolina law to a trial *de novo* in the Superior Court. Prior to the inception of the trial *de novo*, the prosecution obtained an indictment charging Perry with a felony for the same acts for which he had previously been charged with a misdemeanor. The net result was an increase

of eleven months in Perry's sentence.

Noting that prosecutors have a "considerable stake" in discouraging new trials, this Court observed that "if the prosecutor has the means readily at hand to discourage such appeals by 'upping the ante' . . . the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial." *Id.* at 27-28. Consequently, this Court held "that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*." *Id.* at 28-29.

This Court in *Blackledge* reasoned that when the circumstances "pose a realistic likelihood of 'vindictiveness' . . . due process of law requires a rule analogous to that of the *Pearce* case." *Id.* at 27.

Pearce and *Blackledge* therefore establish that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not attributable to a vindictive motive. *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1369 (9th Cir. 1976).

According to the circuit court in the case *sub judice*, "[t]he concerns expressed in *Blackledge* have persuaded several lower courts to limit the prosecutor's discretion in related situations." *Hayes v. Cowan, supra* at 44, citing *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974); *United States v. Ruesga-Martinez, supra*; *United States v. Butler*, 414 F. Supp. 394 (D. Conn. 1976); *Sefcheck v. Brewer*, 301 F. Supp. 793 (S.D. Iowa 1969).

Following the constitutional principles enunciated by this Court in *Pearce* and *Blackledge*, both *supra*, as well as their application by lower federal courts in comparable factual situations, the circuit court in the instant case held "that a similar potential for impermissible vindictiveness exists when a prosecutor is allowed to bring an habitual offender indictment against a defendant who has refused to plead guilty to an indictment for the same

unenhanced substantive offense."[4] *Hayes v. Cowan, supra* at 44. The circuit court below concluded that "due process" was "offended by placing [Hayes] in fear of retaliatory action for insisting upon his constitutional right to stand trial" and ruled that Hayes' enhanced punishment as an habitual offender must be vacated as the product of an unconstitutional action by the prosecutor. *Id.* at 45.

As in *Blackledge, supra,* "[t]he question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case." *Blackledge v. Perry, supra* at 27. In the case at bar, as in *Blackledge,* "the central figure is not the judge or the jury, but the prosecutor." *Id.*

For a time it was uncertain whether due process required that criminal defendants be shielded from the danger of prosecutorial vindictiveness and specifically from increases in the offense charged. In *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973), this Court suggested that prosecutorial vindictiveness was not to be feared, at least insofar as it might bring about an increased sentence at a jury trial through an increased sentence recommendation. *Id.* at 27 n. 13. However, because there existed a "realistic likelihood of 'vindictiveness'" on the part of the prosecutor, this Court in *Blackledge, supra,* made the rule of *Pearce* fully applicable to the prosecutor as well as the sentencing authority. *United States v. Jamison, supra* at 415.

In prior decisions, this Court has developed criteria for assessing whether the "possibility of vindictiveness" inheres in a situation. For example, in *Chaffin v. Stynchcombe, supra,* this Court concluded that "there is no real basis for holding that jury resentencing poses any real threat of vindictiveness." *Id.* at 28. To arrive at this determination, this Court noted that "[t]he first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentences" and acknowledged that

[4]The charging power of the prosecutor has been circumscribed in other contexts. *See, e.g., United States v. Falk,* 479 F.2d 616 (7th Cir. 1973); *Dixon v. District of Columbia,* 394 F.2d 966 (D.C. Cir. 1968); *MacDonald v. Musick,* 425 F.2d 373 (9th Cir. 1970).

customarily juries lack such information. *Id.* at 26. Next, it was recognized that "the jury, unlike the judge who has been reversed, will have *no personal stake* in the prior conviction and *no motivation* to engage in self-vindication." *Id.* at 27; emphasis added. In this respect, "the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals." *Id.*

The "potential for vindictiveness" was also found lacking in Kentucky's trial *de novo* court on the basis of a comparable version of these criteria. *Colten v. Commonwealth of Kentucky,* 407 U.S. 104 (1972).

However, when this Court analyzed "the opportunities for vindictiveness" in the *Blackledge* case, factors such as the prosecutor's "knowledge," "personal stake," "motivation," and "sensitivity to institutional interests," impelled the conclusion that "a potential for vindictiveness" existed in the ability of the prosecutor to substitute a more serious charge for the original one when a convicted defendant pursued his statutory right to a trial *de novo.*

As in *Blackledge,* "[a] prosecutor clearly has a considerable stake in discouraging" accused individuals from exercising their constitutional right to a trial by jury to determine their guilt since such a trial "will clearly require increased expenditures of prosecutorial resources" before the defendant's conviction may be achieved, and "may even result" in the defendant going free. *Blackledge v. Perry, supra* at 27.

These exact factors have been previously recognized by this Court as advantages which the State and its representative, the prosecutor, incur when the defendant enters a plea of guilty. "[W]ith the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is a substantial doubt that the State can sustain its burden of proof." *Brady v. United States,* 397 U.S. 742, 752 (1970). Indeed, "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by

many times the number of judges and court facilities." *Santobello v. New York*, 404 U.S. 257, 260 (1971). Due to the guilty plea and the often concomitant plea bargain, "[j]udges and prosecutors conserve vital and scarce resources." *Blackledge v. Allison*, ___ U.S. ___ , 97 S. Ct. 1621 (1977).

Petitioner readily admits that "[b]ecause of the desirable reasons for engaging in plea bargaining . . . prosecutors attempt to structure a criminal case so that a defendant will choose not to go to trial" (Brief, p. 12).

The realities of the criminal justice system irrefutably establish that the prosecutor with his "sensitivity to the institutional interests" which are promoted by a guilty plea has "a considerable interest in discouraging" contested jury trials. As a result of this "personal stake" in obtaining guilty pleas, the prosecutor has an apparent "motive" for vindictiveness and retaliation against a defendant who declines the prosecutor's proposed "plea bargain."

To provide empirical substantiation to the charge that prosecutors have an undeniable "motive" for discouraging pleas of not guilty, this Court need look no further than the transcript of the respondent's state trial. While cross-examining respondent during the habitual offender portion of the trial, the prosecutor admitted this motive:

> . . . isn't it a fact that I told you if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions? (App., p. 50).

Unlike the resentencing jury in *Chaffin* and the Kentucky trial *de novo* court in *Colten*, the prosecutor does have motivation for vindictiveness when his proposed "plea bargain" is spurned by an accused.

The next focal point in assessing the "opportunities for vindictiveness" is whether the prosecutor "has the means readily at hand to discourage" pleas of not guilty — "by 'upping the ante' " through reindictment "on a more serious charge than the original one." *Blackledge v. Perry, supra* at 27-28.

As the circuit court below recognized, "[w]hen a prosecutor obtains an indictment less severe than the facts known to him at the time might permit, he makes a discretionary determination that the interests of the state are served by not seeking more serious charges." *Hayes v. Cowan, supra* at 44. Accordingly, when the prosecutor in the case *sub judice* initially obtained an unenhanced indictment for the offense of uttering a forged instrument, he made a discretionary determination that a conviction of that offense with the possibility of a maximum sentence of ten years imprisonment was all that was warranted under the circumstances.

However, since Mr. Hayes was willing to risk that maximum term of ten years incarceration on the possibility that a jury would vindicate him, the prosecutor turned to a "means readily at hand to discourage" Mr. Hayes from pleading not guilty. The prosecutor's "means" was the threat of reindictment on a more serious offense — in this case, the habitual offender statute with its mandatory life sentence.

Undoubtedly, a prosecutor's threat to reindict on a more serious offense, even before trial has commenced, is an effective means of discouraging a defendant from pleading not guilty. In the parlance of *Blackledge*, the reindictment on a more serious charge undoubtedly amounts to "upping the ante."

By employing the threat of reindictment on a more serious offense, the prosecutor "can insure that only the most hardy defendants will brave the hazards" of a trial on the merits. *Blackledge v. Perry, supra* at 28. In the instant case Mr. Hayes refused to accept the prosecutor's plea bargain, exercised his constitutional right to plead not guilty, braved the hazards of a trial on the more serious habitual offender charge, and received a sentence to life imprisonment.

Measured by the principles enunciated in *Pearce* and *Blackledge*, the prosecutorial tactic of threatening to seek a new indictment on a more serious charge to discourage a defendant from pleading not guilty is constitutionally impermissible. The ancillary theorem in such a situation requires that due process prohibit the prosecutor from following up his threat with a new

indictment on a more serious offense. *Blackledge v. Perry, supra* at 28.

Petitioner asserts that "the unconstitutional vindictiveness alleged to exist in the plea bargaining practice [at bar] . . . pales when a comparison is made to plea bargaining practices such as offering to amend a felony count to a misdemeanor, but upon rejection of the offer, seeking at trial the maximum penalty permitted for the felony offense" (Brief, p. 22).

In an endeavor to mitigate the vindictiveness of the tactic employed by the prosecutor in the case at bar, petitioner has characterized "[t]he whole practice of plea bargaining" as "coercive" (Brief, p. 22). This characterization by petitioner appears to be a pejorative paraphrase of this Court's observation in *Brady v. United States, supra* at 750, that "[t]he State to some degree encourages pleas of guilty at every important step in the criminal process." Certainly, petitioner misconceives the fundamental distinction between the prosecution's offer of concessions or promises of leniency to influence or encourage a guilty plea and the prosecution's threat to seek a more severe charge to "discourage" the exercise of the constitutional right to plead not guilty.[5]

Indeed, this Court in *Brady, supra*, declined to hold that a guilty plea is unconstitutional simply because it is "motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law *for the crime charged.*" *Id.* at 751 (emphasis added). However, this Court refused to extend its approval "to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty." *Id.* at 751 n.8.

[5]There is a marked contrast between encouraging and inducing a defendant to plead guilty. The word "encourage" means "to stimulate by assistance, approval, etc." *The Random House Dictionary of the English Language, The Unabridged Edition*, Random House, New York (1969). "Induce," on the other hand, means "to lead or move by persuasion or influence, as to some action, state of mind, etc." *Id.*

Whatever might be said of the prosecutor's charging discretion and bargaining prerogatives, "they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." *United States v. Jackson, supra* at 582. Both *Pearce* and *Blackledge* acknowledge that the foregoing constitutional principle excerpted from *Jackson* is the lodestar of the prophylactic rule they enunciate.

Respondent readily admits that "*Jackson* did not hold . . . that the Constitution forbids every government imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Chaffin v. Stynchcombe, supra* at 30. For instance, "the decision by a defendant at the close of the state's evidence at trial that he must take the stand or face certain conviction" is not improperly compelled because of "the State's responsibility for some of the factors" which discourage his exercise of his Fifth Amendment right to remain silent. *Brady v. United States, supra* at 750.

Nevertheless, "[b]ecause the legitimate goal of" the disposition of criminal charges by agreement between the prosecutor and the accused "could be achieved without penalizing those defendants who plead not guilty and elect a jury trial," the prosecutorial tactic of threatening to reindict on a more serious charge unless the accused pleads guilty to the original charge " 'needlessly penalize[d] the assertion of a constitutional right.' " *Id.* at 746. Such a prosecutorial ploy is, therefore, unconstitutional.[6]

Despite petitioner's argument to the contrary, "[t]he day our Constitution permits prosecutors to deter defendants from exercising any and all of their guaranteed rights by threatening them with new charges fortunately has not yet arrived." *United States v. DeMarco*, 401 F. Supp. 505, 510 (C.D. Cal. 1975), *aff'd* 550 F.2d 1224 (9th Cir. 1977).

[6]As this Court noted in *United States v. Jackson, supra* at 583:
"For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right."

Even though in *Blackledge* there was "no evidence that the prosecutor . . . acted in bad faith or maliciously in seeking a felony indictment," that factor was not deemed dispositive since the *Pearce* decision "was not grounded upon the proposition that actual retaliatory motivation must inevitably exist." *Blackledge v. Perry, supra* at 28.

Applying the principles of *Pearce*, this Court in *Blackledge* emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise" of his rights, "due process also requires that a defendant be freed of apprehension of such a retaliatory motivation." *Id.*

To insure that "a potential for vindictiveness" would not deter any convicted defendant from exercising his right to a trial *de novo*, this Court announced the prophylactic rule that "it was not constitutionally permissible for the State to respond to . . . [a defendant's] invocation of his right to appeal by bringing a more serious charge against him prior to the trial *de novo*." *Id.* at 28-29.

Blackledge and *Pearce* each establish a prophylactic rule imposing limits upon prosecutorial discretion in seeking new indictments or in conducting retrials when such actions carry with them the opportunity of retaliation for a defendant's exercise of a right that has due process implications. *United States v. DeMarco, supra*, 550 F.2d at 1227.

Pearce and *Blackledge* mandate that when the prosecution has occasion to reindict the accused because he has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by vindictiveness. *United States v. Ruesga-Martinez, supra* at 1369.

It is irrelevant that a particular defendant exercises his procedural rights, despite his fear of vindictiveness and despite the lack of vindictiveness in fact in subsequent proceedings instituted by the prosecutor. The prophylactic rule of *Blackledge* and *Pearce* is designed not only to relieve the defendant who has asserted his right from bearing the burden for "upping the ante" but also to prevent chilling the exercise of such rights by other

defendants who must make their choices under similar circumstances. *United States v. DeMarco, supra*, 550 F.2d at 1227.

Applying the prophylactic rule of *Blackledge* and *Pearce* to the case *sub judice*, the circuit court below reasoned that "if after plea negotiations fail, he [the prosecutor] then procures an indictment charging a more serious crime, a strong inference is created that the only reason for the more serious charges is vindictiveness." *Hayes v. Cowan, supra* at 44-45. Under such circumstances, "the prosecutor should be required to justify his action." *Id.*

Accordingly, under the prophylactic rule of *Blackledge* "due process has been offended by placing [respondent] in fear of retaliatory action for insisting upon his constitutional right to stand trial." *Hayes v. Cowan, supra* at 45.

Unlike the factual context of *Blackledge*, the case at bar contains irrebuttable evidence that the prosecutor's reindictment of respondent on a more serious charge was undertaken with a vindictive or retaliatory motive. Eschewing the need for a prophylactic rule in the case at bar, the circuit court below remarked, "In this case, a vindictive motive need not be inferred. The prosecutor has admitted it." *Hayes v. Cowan, supra* at 45.

Even in instances where there is no "real threat of vindictiveness," this Court has expressly noted that the Due Process Clause would be offended if the increased sentence was "otherwise shown to be a product of vindictiveness." *Chaffin v. Stynchcombe, supra* at 35.

Under both the prophylactic rule of *Blackledge* and the due process test of actual vindictiveness, the prosecutor's threat to reindict respondent on a more serious charge if respondent exercised his constitutional right to plead not guilty was impermissibly vindictive and violative of due process.

Accordingly, the decision of the circuit court in the instant case to apply the constitutional safeguards of *Pearce* and *Blackledge* to the prosecutor's admittedly vindictive and retalatory reindictment of respondent following the breakdown of plea negotiations is in complete conformity with this Court's past decisions and serves to insure the integrity of the plea

bargaining process as well as the free exercise of constitutional rights.

B. A PROSECUTOR'S THREAT TO REINDICT AN ACCUSED ON A MORE SERIOUS CHARGE UNLESS HE PLEADS GUILTY IS NO LESS VINDICTIVE OR RETALIATORY BECAUSE IT IS MADE IN THE GUISE OF PLEA BARGAINING.

In the initial portion of his argument petitioner expends time and effort to justify the prevalent practice of the "disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining.'" *Santobello v. New York, supra* at 260. Such a task is indeed unnecessary. This Court has repeatedly recognized that plea bargaining is not only constitutional, but is "an essential component of the administration of justice." *Brady v. United States, supra* at 751, 753; *Santobello v. New York, supra* at 260; *Blackledge v. Allison, supra*, 97 S. Ct. at 1627. Respondent has at no time in the proceedings below intimated a belief that plea bargaining is inherently unconstitutional. Even the circuit court below, as a prelude to its analysis of the issue at bar, recognized that "plea bargaining now plays an important role in our criminal justice system" and noted this Court's approval of this method of disposing of criminal charges. *Hayes v. Cowan, supra* at 43. The legitimacy of the practice of plea bargaining "has not been doubted." *Chaffin v. Stynchcombe, supra* at 31 n.18.

That the constitutionality of plea bargaining is beyond doubt is not the end of the inquiry, but only the beginning. "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. . . . However, all of these considerations presuppose *fairness* in securing agreement between an accused and a prosecutor." *Santobello v. New York, supra* at 261 (emphasis added).

Similarly, this Court has recognized that only if "properly administered" can the guilty plea and the often concomitant plea bargain "benefit all concerned." *Blackledge v. Allison, supra*, 97 S. Ct. at 1627. It is only when "properly administered" that plea bargaining "is to be encouraged." *Santobello v. New York, supra* at 260.

Two basic principles are easily culled from this Court's pronouncements on the subject of plea bargaining. Plea negotiations and the often resultant guilty plea must transpire in an environment of "fairness" and "proper administration." As noted by the circuit court below, this Court "has recognized . . . that there are limits to the tactics that a prosecutor may use in bargaining with defendants." *Hayes v. Cowan, supra* at 43, citing *Santobello v. New York, supra*.

Plea bargaining as a "legitimate system"contemplates "the negotiation of pleas." *Chaffin v. Stynchcombe, supra* at 31. Within the context of negotiation and agreement, "[a] promise by the prosecutor of sentence leniency or a charge reduction as a concession for a plea of guilty is a major characteristic of the negotiated plea process." D. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial*, at 29 (1966).

As this Court explained in *Brady, supra*, the practice of plea bargaining involves "the State . . . extend[ing] a benefit to a defendant who in turn extends a substantial benefit to the state."[7] *Brady v. United States, supra* at 753.

To justify the admittedly vindictive actions of the prosecutor in the instant case, petitioner has attempted to portray "plea bargaining" as an inherently coercive, vindictive and threatening procedure. Obviously, petitioner's analysis of the normal mode of plea bargaining rejects this Court's observations in *Brady*,

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[7]Undoubtedly the "greatest danger" involved in offering leniency for guilty pleas is that an innocent person might thereby be induced to plead guilty. Comment, 66 *Yale L.J.* 204, 220 (1956). Because "there is no such thing as a beneficial sentence for an innocent defendant," plea negotiations can be justified "only if the result is both to produce the needed guilty pleas and to persuade only guilty defendants to plead guilty." Comment, *32 U. Chi. L. Rev.* 167, 176, 181 (1964).

supra, that "both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law." *Id.* at 752. According to this Court, "[i]t is this mutuality of advantage that perhaps explains the fact that well over three-fourths of the criminal convictions in this country rest on pleas of guilty." *Id.* Within such an atmosphere of "mutuality of advantage," it is obvious that negotiations for a reduced sentence in exchange for a plea of guilty do not, under normal circumstances, "pose a realistic likelihood of vindictiveness." However, when the accused declines the sentence reductions offered by the prosecutor and refuses to plead guilty, a prosecutor's threat to obtain more severe charges against the defendant unless he pleads guilty is undeniably vindictive and retaliatory in motive.

It has long been recognized that "[a] guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." *Machibroda v. United States*, 368 U.S. 487, 493 (1962). In fact, the threat to bring additional prosecutions is sufficient to render a guilty plea voidable. *Id.* "Of course, the agents of the State may not produce a plea . . . by mental coercion overbearing the will of the defendant." *Brady v. United States, supra* at 750.

Recognizing the potential for abuse in plea bargaining, the circuit court in the case at bar emphatically observed that "it is clear that the legitimate purposes of plea bargaining are not served if a prosecutor abuses his powers in order to coerce an unwilling defendant into foregoing his constitutional right to trial." *Hayes v. Cowan, supra* at 44.

Voicing disapproval of the practice employed by the prosecutor in the instant case, the circuit court below noted the findings of the President's Commission of Law Enforcement and Administration of Justice in *The Challenge of Crime in a Free Society* (1967):

> At the same time the negotiated plea of guilty can be subject to serious abuses . . . There are also real dangers that excessive rewards will be offered to induce pleas *or that prosecutors will threaten to seek a harsh sentence if the*

> *defendant does not plead guilty.* Such practices place unacceptable burdens on the defendant who legitimately insists upon his right to trial. (Emphasis supplied.) *Hayes v. Cowan, supra* at 43.

The circuit court below expressed its disagreement with petitioner's argument that "the entire concept of plea bargaining will be destroyed" if prosecutors are precluded from obtaining more severe charges against defendants who refuse to plead guilty. *Hayes v. Cowan, supra* at 44. Although acknowledging that "a prosecutor may in the course of plea negotiations offer a defendant concessions relating to prosecution under an existing indictment," the circuit court emphasized that the prosecutor "may not threaten a defendant with the consequences that more severe charges may be brought if he insists on going to trial." *Id.*

In the case at bar the "plea bargain" advanced by the prosecutor is readily severable into an *offer* and a *threat*. The *offer*, the constitutionally permissible concession or benefit extended to encourage a guilty plea, was the prosecutor's promise to recommend to the sentencing judge that Mr. Hayes be sentenced to but five years confinement, instead of the authorized maximum of ten years. The *threat*, the unconstitutional "means at hand to discourage" respondent from exercising his right to plead not guilty, was the warning that if the initial "offer" was not accepted the prosecutor would reindict Mr. Hayes as an habitual offender and thereby escalate the maximum sentence from ten years to a mandatory sentence of life imprisonment.

An analogy is found in the law of contracts. Compulsion produced by threats may be sufficient to destroy free agency and prevent the formation of a binding contract. In order that an agreement be invalid because of threats, it is necessary that the threats and circumstances be of a character to excite the reasonable apprehensions of a person of ordinary courage, and that the agreement be made under the influence of such threats. Furthermore, the threats must be tangible or direct. 17 *Am. Jur. 2d*, Contracts § 153 (1964).

It has long been acknowledged that "threats, force or other

coercion are clearly improper at all stages of the criminal justice process." Newman, *supra* at 28. For this reason, "when the government impermissibly uses its charging power as a bargaining tool . . . its power to bring new charges will be appropriately confined." *United States v. DeMarco, supra*, 401 F. Supp. at 512.

Petitioner asserts that the "unconstitutional vindictiveness" alleged to exist in the prosecutor's threat to reindict on a more serious charge "pales" when compared with other "plea bargaining practices" (Brief, p. 22). For example, petitioner cites the prosecutorial practice of "offering to amend a felony count to a misdemeanor, but upon rejection of the offer, seeking at trial the maximum penalty permitted for the felony offense" (Brief, p. 22).[8]

In petitioner's example, the maximum penalty the defendant braves when he pleads not guilty is the maximum penalty authorized by law for the felony offense. If the defendant and the prosecutor never discuss a plea bargain, the defendant by his plea of not guilty will risk, at most, the possibility that his conviction will result in the imposition of the maximum sentence authorized for the felony. If the defendant and the prosecutor negotiate but the defendant declines to plead guilty in return for the offered amendment of the felony charge to a misdemeanor, the defendant, even though he rejected the prosecutor's offer, will still risk only the maximum penalty authorized for the original felony charge.

Logic reveals that in petitioner's example there is no threat, but only an offer of leniency. When the defendant declines the prosecutor's offer, the parties are restored to their original positions with their concomitant risks. However, when Mr. Hayes declined the prosecutor's offer to exchange a plea of guilty for a five-year sentence recommendation, the prosecutor

[8]Petitioner perhaps ascribes too great an impact to the prosecutor's recommendation to the jury that a defendant should be sentenced to a maximum penalty. "Prosecutors often request [of the jury] more than they can reasonably expect to get, knowing that the jury will customarily arrive at some compromise sentence." *Chaffin v. Stynchcombe, supra* at 27 n.13.

threatened to raise Mr. Hayes' potential risk by reindicting him as an habitual offender. Mr. Hayes' refusal to barter his constitutional right to plead not guilty resulted in a substantial change in his original bargaining position — a detrimental change in which the maximum punishment he faced was inflated to life imprisonment.

The contrast between petitioner's hypothetical example and the situation at bar dramatically demonstrates the distinction between an "offered concession" and a "threat." "While threats, force or other forms of coercion are clearly improper at all stages of the criminal justice process, inducement by a promise of leniency is a common administrative practice throughout the criminal justice system." Newman, *supra* at 28.

Petitioner decries the "application of a prophylactic rule to the plea bargaining practice in this case" because the "*end result* of the procedure used by the prosecutor . . . was no more vindictive so as to impose an impermissible burden upon the assertions of trial rights" than is the situation where a prosecutor initially obtains an enhanced indictment and "then bargains for a plea of guilty to the principal charge on the promise" that the enhancement charge will be dismissed (Brief, pp. 20-21).

Petitioner's argument again misconceives the basic distinction between a concession and a threat. Furthermore, petitioner's position ignores the principle that there must be "fairness in securing agreement between an accused and a prosecutor." *Santobello v. New York, supra* at 261. Ultimately, petitioner's contention ignores the *timing* of the threat and the *nature* of the change in the case which the threat portended. The threat was timed and admittedly calculated to compel Mr. Hayes to decline to exercise his right to plead not guilty. Similarly, the nature of the threatened change in the case amounted to "upping the ante" in an effort "to discourage" Mr. Hayes from exercising his right to a contested trial on the merits.

While a prosecutor may offer to dismiss an existing enhancement charge as a concession to encourage a plea of guilty, he may not coerce a plea of guilty by threatening to reindict on a more serious charge.

Petitioner erroneously focuses on the superficial "end result" of both the "threat" and the "concession." The superficial "end result" is, of course, a plea of guilty to the unenhanced offense.

However, the actual "end result" where the prosecutor threatened to reindict on an enhanced charge is a coerced guilty plea. The actual "end result" where the prosecutor offered to reduce the enhanced indictment to an unenhanced charge is a constitutionally permissible negotiated plea of guilty.

Petitioner lastly suggests that "if Hayes would have chosen to plead guilty and have taken the five years" on the unenhanced indictment "rather than having risked facing the habitual criminal charge and the possibility of . . . life imprisonment," his guilty plea "would be found to be constitutionally permissible." (Brief, p. 23). Such a contention is hardly tenable. In view of the prosecutor's threat, the potential for vindictiveness inherent in the situation would establish that such a guilty plea would have been the product of constitutionally impermissible coercion. *Blackledge v. Perry, supra.* The defendant should never have been required to elect between the fear of the constitutionally impermissible retaliatory reindictment and the exercise of his constitutional right to plead not guilty. Certainly a guilty plea, "if induced by promises or threats which deprive it of the character of a voluntary act," is void. *Machibroda v. United States, supra* at 493.

In the final analysis, the negotiations of plea bargaining characterized by "fairness" between the accused and the prosecutor provide no justification for the prosecutor's resort to a vindictive and retaliatory threat as a means of discouraging a defendant from exercising his constitutional right to a trial on the merits.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1334

DON BORDENKIRCHER, SUPERINTENDENT
KENTUCKY STATE PENITENTIARY, PETITIONER

v.

PAUL LEWIS HAYES, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE OFFICE OF THE CALIFORNIA STATE PUBLIC DEFENDER, THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, AND THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

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INDEX

TABLE OF AUTHORITIES

Statutes and Rules

STATEMENT OF INTEREST OF AMICI CURIAE

The Office of State Public Defender is a new state agency which began operation on July 1, 1976, and which has been assigned by the Legislature with the general functions of representation of criminally accused and incarcerated indigents on appeal (Cal. Gov. Code §§ 15421; 15423), in criminal trials and in administrative hearings while they are incarcerated (Cal. Gov. Code §§ 15421; 15423). The State Public Defender is also authorized to appear amicus curiae and had appeared as such in the Supreme Court of California. During the ordinary course of its work, the office has become deeply involved in matters concerning plea bargains as many appeals, and inevitably every case awaiting trial, involve the propriety of a negotiated resolution of the litigation. California state and federal courts have adopted the rationale of then Judge (now Solicitor General of the United States) McCree in the case below. The State Public Defender seeks to insure that the rationale and result are preserved and promulgated nationally.

The California Public Defenders Association is a non-profit corporation incorporated under the laws of the State of California in 1969. The purpose of the association is to assist all public defender offices in California, whether state or federal, in their ongoing efforts to provide effective representation for indigent defendants. In this regard, the association is vitally concerned with any

action which might have a substantial impact upon the rights of indigents and upon the ability of defense attorneys to protect these rights. The right to a jury trial, a voluntary plea of guilty, and the control of prosecutorial charging abuses are involved in the case at bar. A decision sanctioning the conduct of the prosecutor below would have a deleterious impact on justice in this nation.

The California Attorneys for Criminal Justice (CACJ) is the largest association (1300 members) of its kind in the United States. The purpose of CACJ is to provide opportunities for criminal defense lawyers in California to meet and share ideas and information in connection with improvement of the criminal justice system in order to more effectively represent the accused. The members of CACJ have a common desire to see that the prosecutorial extortion in this case is not given the imprimatur of the United States Supreme Court.

Amici are in agreement that a reversal of the decision of the court below would have disastrous and destructive impact on the Fifth and Sixth Amendment rights of the criminally accused, on the ability of defense attorneys to effectively represent their interests, and provide an unfair and unconstitutional advantage to the prosecutors in state and federal criminal prosecutions.

Amici fully agree with the position of the respondent that the order of the trial court at issue here was improper and that the decision of the Court of Appeals was

correct. This brief is submitted in support of that judgment.

SUMMARY OF ARGUMENT

Plea bargaining in this nation, once thought corrupt and immoral (see note, "The Legitimation of Plea Bargaining: Remedies for Broken Promises," 11 Am. Crim. L.Rev. 771, n. 4 (1973) [hereinafter cited as "Legitimation of Plea Bargaining"], today has evolved to the status of necessary evil. However, the threat by the prosecutor in this case demonstrates why the concept of negotiated pleas of guilty has been shrouded in darkness and demands judicial scrutiny. Unregulated plea bargaining grants unchecked power to one side which, unrestrained, uses its powers to achieve desired ends by available means. "Bargains" under such circumstances become contracts of adhesion where the prosecution is able to use its available might to threaten and coerce defendants into pleas of guilty. If unsuccessful in his threats, the prosecutor may then punish with vengeance those who refuse to be compliant.

This court's decisions sanctioning plea bargaining recognize that the authority sought by petitioner (to threaten a defendant with a life sentence under a habitual offender enhancement statute in order to coerce a plea of guilty to the only charge then existing) cannot be constitutionally given. See Santobello v. New York, 404 U.S. 257 (1971); United States v. Jackson, 390 U.S. 570 (1968). To do so would sanction a practice of prosecutorial extortion, unconstitutionally discourage a

defendant's right to a jury trial, and blacken the appearance of justice in this nation.

The undisputed explanation for what took place in this case is that the respondent was reindicted with a habitual offender enhancement because he was audacious enough to assert his constitutional right to jury trial on a forgery charge rather than to accept a plea bargained five-year sentence. When the prosecution of a criminal case descends to such a level where, because of a defendant's stubborn insistence on putting the government to its proof at a jury trial the "ante is upped," due process of law is subverted. The reindictment in this case is as improper as the enhancement of sentence following a successful appellate attack and reversal in North Carolina v. Pearce, 395 U.S. 711 (1969), or reindicting for a felony violation a defendant who had been convicted of a misdemeanor and exercised his right to a trial de novo by appeal of the misdemeanor conviction (Blackledge v. Perry, 417 U.S. 21 (1974)). In Blackledge, this court considered the necessity for adopting a prophylactic procedural rule to bar vindictive prosecutors from punishing defendants from asserting constitutional rights:

> "The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the Pearce case. We conclude that the answer must be in the affirmative.
>
> "A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formally convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals--by 'upping the ante' through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy--the State can ensure that only the most hearty defendants will brave the hazards of a de novo trial." (Id. at 417 U.S. 21, 27).

Just as in Blackledge and Pearce, here the prosecutor clearly has a considerable stake in discouraging defendants who refuse to plead guilty to an existing indictment from asserting their right to jury trials. Trial, as opposed to pleas, clearly requires increased expenditures of prosecutorial resources and may perhaps result in a defendant going free by an acquittal. Since a prosecutor has the means readily at hand to discourage such a right to trial by "upping the ante" whenever the insistent defendant continues to assert his right to jury trial, the prosecution can insure that only the most hearty defendants will brave the very real

hazardous consequences of jury trial.

The arguments of justification by petitioner and amicus (State of Texas) overstate the holding of the court below and ignore the crucial elements involved in a case such as the timing of the threat and the nature of the change. Here, the prosecution initially opted for the less severe forgery count, and was free of any legal restraint on the bringing of the harsher charge. Thus, the decision not to proceed on the enhancement -- the habitual offender statute -- was explicable only in terms of a knowing and rational rejection of that alternative as an inappropriate characterization of the defendant's conduct and background. When the indictment with the enhancement was later returned, the only intervening events were respondent's demand to go to trial and refusal to plead guilty to the forgery charge.

These events are not a proper basis for reindictment. Even if not prompted by actual vindictiveness, such action at least has that appearance and warrants judicial intervention to determine the grounds of the decision to aggravate the charge, and whether it will be permitted.

ARGUMENT

I

POST-INDICTMENT PROSECUTORIAL THREATS TO A DEFENDANT TO "UP THE ANTE" UNLESS A GUILTY PLEA IS FORTHCOMING CONSTITUTES EXTORTION WHICH PENALIZES THE EXERCISE OF THE RIGHT TO JURY TRIAL AND DENIGRATES THE APPEARANCE OF JUSTICE.

It is as important to define what is not involved in this case as it is to define the issue. The court below and respondent do not question the prosecutor's authority to bring felony charges against respondent in the first instance, nor do they question the prosecutor's discretion in initially choosing which charges to bring against respondent. The issue in this case is not nearly as broad as petitioner stretches it. The question is simply whether a prosecutor, after initially making a rational decision to indict on a specific charge, may reindict on charges far more aggravated only because the accused has exercised his constitutional right to trial by jury on the original indictment. Amici submit that the answer to this question is a resounding no.

A. The Decisions of this Court Upholding Plea Bargaining Do Not Grant the Prosecution Unlimited Power in Securing Plea Agreements.

In upholding the constitutionality of plea bargaining, this court noted that the many reasons supporting plea bargaining "presuppose fairness in securing agreement between an accused and a prosecutor."

Santobello v. New York, 404 U.S. 257, 261 (1971). This court recognized that "the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances" (Id. at 262). The necessity for judicial supervision over the plea bargaining process is made apparent by the instant case and the serious stakes involved. Prosecutorial threats to enhance charges absent a guilty plea to the original indictment place a huge price on a defendant's exercise of his right to jury trial, to confront his accusers, to present witnesses in his defense, to remain silent, and to be convicted by proof beyond a reasonable doubt.

The decision of the court below is a natural and logical interpretation of this court's decisions in the area of guilty pleas and plea bargaining. In Machibroda v. United States, 368 U.S. 487 (1962), this court held that a habeas corpus petitioner made a cognizable allegation under 28 U.S.C. section 2255 in alleging that the prosecutor had made ex parte promises to the defendant-petitioner for an agreed-upon sentence. The prosecutor allegedly threatened the defendant-petitioner with two other robbery counts if the defendant "insisted in making a scene." This court held that a hearing would be necessary to resolve the allegations because a guilty plea "if induced by promises or threats which deprive it of the character of a voluntary act, is void" (Id. at 493).

In United States v. Jackson, 390 U.S.

570 (1968), this court struck down a provision of the Federal Kidnapping Act which made the offense punishable by death if the verdict of the jury so recommended. No death penalty could be obtained by court trial. This court held that the provision was invalid as imposing an impermissible burden on a defendant's exercise of his Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand trial by jury.

In 1970, this court announced the famous guilty plea trilogy of cases, Brady v. United States, 397 U.S. 742; McMann v. Richardson, 397 U.S. 759; Parker v. North Carolina, 397 U.S. 790. Brady upheld the voluntariness of a plea to a violation of the Federal Kidnapping Act. The court reserved ruling on a "situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty." 397 U.S. 751 n.8. The court concluded its opinion in Brady with the following pertinent language:

> "We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves." (Id. at 758).

The court expressed its confidence in Brady that trial courts would satisfy themselves that pleas of guilty were made voluntarily.

Threats of harsh treatment by a prosecutor made to induce guilty pleas unfairly burden and intrude upon a defendant's decision-making ability. Compare Garrity v. New Jersey, 385 U.S. 493 (1967) (the surrender of the self-incrimination privilege is involuntary when an individual is presented by the government with the choice of discharge from employment if the privilege is invoked).

In sum, the decisions of this court in the realm of plea bargaining have upheld the procedure. In doing so, the court has made it clear that there will be judicial supervision of the process in order to insure basic fairness on the part of the prosecutor. When these rulings are combined with this court's pronouncements in North Carolina v. Pearce, 395 U.S. 711 (1969), and Blackledge v. Perry, 417 U.S. 21 (1974), it is clear that the actions of the prosecutor below are in violation of due process of law.

B. Under Blackledge v. Perry, and North Carolina v. Pearce, Vindictive Indictments Are Constitutionally Impermissible.

In North Carolina v. Pearce, supra, this court considered the constitutional problems presented when, following a successful appeal and reconviction, a defendant is subjected to greater punishment than that imposed at the first trial. This court held that the invocation of a harsher penalty at the second trial against a defendant merely because the latter successfully pursued his statutory

right of appeal is a violation of due process of law (395 U.S.711,724). The court held that an enhanced sentence after a second trial was permissible only where the sentencing judge placed certain specified findings on the record. This prophylactic rule was necessary to insure that defendants were not punished for exercising procedural rights.

In Blackledge v. Perry, supra, this court focused on a "realistic likelihood of 'vindictiveness'" of the prosecutor (417 U.S.21, 27). The court went on to hold "that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo" (417 U.S. 21, 28-29).

The doctrine that flows from Pearce and Perry is simply that a prosecutor may not vindictively punish a defendant solely because the latter has chosen to exercise a constitutional or statutory right. The majority of cases dealing with the issue have so ruled. See United States v. DeMarco, 550 F.2d 1224 (9th Cir. 1977); Hayes v. Cowan, 547 F.2d 42 (6th Cir. 1976), cert. granted 6 June 1977 (this case); United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976); United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974); United States v. Jamison, 505 F.2d 407 (1974); Sefcheck v. Brewer, 301 F.Supp. 793 (S.D. Iowa, E.D. 1969); In re David B., 68 Cal.App.3d 931 (1977); and compare United States v. Preciado-Gomez, 529 F.2d 935 (9th Cir. 1976).

The brief for petitioner cites no cases upholding the constitutionality of such prosecutorial conduct. The State of Texas, as amicus curiae, relies on this court's holding in Oyler v. Boles, 368 U.S. 448 (1962). There, this court simply held that there was no denial of equal protection of the laws upon a record which only demonstrated that not every eligible candidate was charged as a habitual criminal offender. "Hence the allegations set out no more than a failure to prosecute others because of a lack of knowledge of their prior offenses. This does not deny equal protection. . . ." (id. at 456). Texas also cites Martinez v. Estelle, 527 F.2d 1330 (5th Cir. 1976), wherein the defendant was indicted for possession of heroin with two prior felony convictions also alleged. In return for waiving his right to trial by jury, the prosecution agreed to drop the habitual offender enhancements (the two felony count allegations). After conviction, the defendant appealed and was granted a new trial. The second indictment was identical to the first, but the defendant refused a similar offer in return for a jury waiver. Upon conviction of the substantive offense and the enhancement, the defendant appealed claiming vindictive prosecution.

Because there was no retaliatory state response as exemplified by aggravated charges, the defendant's charge was meritless. The case is thus patently distinguishable from the instant one in that there was no change of prosecutorial position in reaction to the defendant's assertion of his right to trial. The same

analysis pertains to Arechiga v. Texas, 469 F.2d 646 (5th Cir. 1972), relied upon by Texas. 1

Interestingly, the Fifth Circuit in Colon v. Hendry, 408 F.2d 864 (5th Cir. 1969), held impermissible an increase in charges against the defendant which were brought in retaliation for the latter's seeking federal habeas corpus relief. Citing United States v. Jackson, supra, for the illegality of needlessly penalizing one for asserting a constitutional right, the court recognized that the defendant's position had been substantially worsened simply because he exercised his constitutional right: "Here there has been no retrial; only a charge of more gravity: a felony as distinguished from a

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1 In re Breen's Petition, 237 F.Supp. 575 (S.D. Tex. 1964), cited by Texas is a holding identical to that of Oyler v. Boles, supra, and thus adds nothing to the position in support of the petitioner.

misdemeanor. Although there has been as yet no retrial and no sentence, it cannot be said that the plight of petitioner has not substantially worsened" (408 F.2d 864,866).

C. Petitioner Overstates the Holding and Impact of the Decision of the Court Below.

Petitioner characterizes the decision of the court below as holding "that a prosecutor may not constitutionally seek an additional indictment, specifically under an enhancement statute, if an accused chooses to stand trial rather than plead guilty to an offer made by the prosecutor on the original charge" (Brief for Pet. 16). The petitioner continues that this decision "erodes prosecutors' use of their plea bargaining leverage. . . ." (id. at 19), and that "the role of plea bargaining as an effective tool on the administration of justice will have been significantly diminished" (id. at 20).

The holding of the court below, of course, neither contains the broad ruling suggested, nor has the disastrous impact hypothesized. The holding is grounded in the assumption that the initial charging decision by a prosecutor is an honest assessment of the charges upon which a defendant should be indicted. See the American Bar Association, Standards Relating to the Prosecution Function, section 3.9 (Approved Draft 1968). Although the petitioner evidently embraces the concept that prosecutors may "attempt to structure a criminal case so that a defendant will

choose not to go to trial" (Brief for Pet. 12), this practice of overcharging is to be condemned. See Bennett, "An Offer You Can't Refuse! The Current Status of Plea Bargaining in California," 7 Pac. L.J. 80, 101 (1976). Here, the prosecution was fully aware of petitioner's record, but made a rational choice in electing not to use the enhancement because of the non-aggravated nature and paucity of respondent's previous transgressions of the law. The Watergate Special Prosecutor, in a recent brief to this court, summarized the proposition as follows:

> "Where the prosecution has the discretion to prosecute certain criminal conduct with varying degrees of severity and initially opts for the less severe charge, there is a tacit assumption that the decision so to proceed was sound and rational and encompassed a rejection of the more severe alternative. A subsequent substitution of the more severe charge, based on the same facts, makes the motives of the prosecution presumptively suspect." [Citation to Hayes v. Cowan.] 2

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2 Petition for a writ of certiorari, United States v. DeMarco, p.12 (May 1977). The position of the Watergate Special Prosecutor combined with that of Judge (now Solicotor General) McCree in his opinion below, indicates that in this case federal prosecutors recognize the gross impropriety of such prosecutorial action.

Thus, the prosecution in the instant case was free to charge petitioner originally with the enhancement. The decision not to do so may only be explained as a knowing and rational acceptance of the forgery count as an appropriate characterization of the defendant's conduct and background. When the enhancement indictment was brought after the failure of plea bargaining and the accompanying prosecutorial threats, the only intervening event was the respondent's assertion of his constitutional right to proceed to trial. It is only in this context of prosecution retaliation for a defendant's election to proceed with a constitutional, statutory or procedural right, that the need for proscription arises. This case in no way interferes with a prosecutor's determination of whether to charge and what to charge. It will not invade the province of the prosecutor in choosing to accept pleas to selected counts, lesser included offenses, for recommendations as to sentence, to reduce charges, dismissal of other charges, or potential charges against a defendant. Indeed, assuming a proper validation for increased charges after plea bargaining, there may be no proscription against a reindictment for additional charges. See Blackledge v. Perry, supra, at 29 (n. 7: "This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in Diaz v. United States, 223 U.S. 442. . . .") In order to remove the suspect nature of such action, however, "the reasons for such increases, as well as the factual bases, must be made

a part of the record at the time the higher indictment is filed with the court." United States v. Jamison, supra at 416. Examples of such situations are where a victim dies after the first indictment, or where new evidence of which the government was excusably unaware is discovered. A proper showing would demonstrate that the added charges are brought for proper reasons and not as punitive retaliation against a defendant who exercises his right to trial.

II

PETITIONER'S REQUEST FOR UNBRIDLED DISCRETION IN PROSECUTORIAL CHARGING POWER AND PLEA BARGAINING AUTHORITY MUST BE RESOLUTELY REJECTED BY THIS COURT.

When the facts of this case are put into their proper perspective, they demonstrate an unconscionable activity on the part of the prosecutor who, in an effort to prevent respondent from asserting his constitutional right to trial by jury, threatened to "up the ante" from a maximum of ten years on the original indictment to that of life imprisonment on the subsequent indictment. Respondent's only action which warranted the reindictment was his "unreasonable" choice to stand trial (see Brief for Pet. 15-16). Petitioner contends that the Pearce-Perry holdings are inapposite because they involve retaliatory actions by a court or prosecutor after an attempt by a defendant to exercise a right. Here, so the argument goes, "there exists no right to be bargained with by the prosecutor for a plea of guilty" (Brief for Pet. 18). However, respondent had a right to go to trial unthreatened by charges the prosecution believed originally inappropriate to bring. Thus, petitioner misses the crucial point as typified by the following:

> "The end result of the procedure used by the prosecutor in this case was no more vindictive so as to impose an impermissible burden upon the assertion of trial rights than is the frequent situation where a

> prosecutor indicts on a principal charge and also under an enhancement statute and then bargains for a plea of guilty to the principal charge on the promise the prosecutor will make a motion to drop the habitual criminal charge. The difference between the leverage and impact involved in the present case and that in the procedure noted above is non-existent " (Id. at 20-21).

The missing element in the above analysis is that in this case, the prosecution made a reasoned, discretionary judgment that the respondent was not a fit candidate for the habitual criminal charge although he technically came within its ambit. To thereafter threaten the enhancement as a means to coerce a guilty plea is the type of manipulative tool which no ethical prosecutor needs or should desire. 3

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3 The common problem of vertical and horizontal prosecutorial overcharging whereby charges are puffed to induce guilty pleas to lesser charges, must await court scrutiny another day. See generally "The Legitimation of Plea Bargaining," supra; Alschuler, "The Prosecutor's Role in Plea Bargaining," 36 U.Chi.L.Rev. 50 (1968).

Petitioner requests this court to view this case from the prospective of respondent's having pled guilty to the forgery charge under the plea bargain. "Clearly" says petitioner, "this would be found to be constitutionally permissible" (Brief for Pet. 23). The best answer to this hypothetical question is found in United States v. Jackson, 390 U.S. 570,583, where this court stated:

> "It is no answer to urge, as does the Government, that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. Thus the fact that the Federal Kidnapping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily." [Emphasis in original].

Thus, the fact that respondent might have chosen to have pled guilty is irrelevant to the analysis of the problem, "for the evil to which Pearce is directed is the apprehension on the defendant's part

of receiving a vindictively imposed penalty for the assertion of rights" United States v. Jamison, 505 F.2d 407, 415. Here, the sole motivation of the prosecutor was to coerce a plea of guilty out of respondent. That this is a violation of constitutional rights is apparent for "If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." United States v. Jackson, supra at 581. The petitioner's efforts to obtain this court's imprimatur on such conduct should be firmly rejected.

CONCLUSION

For the foregoing reasons, as well as those contained in respondent's brief, amici respectfully submit that this court affirm the decision of the Court of Appeals.

Charles M. Sevilla, Chief
Assistant State Public
Defender
107 South Broadway,
Suite 9111
Los Angeles, California 90012

For the Amici

Paul N. Halvonik
State Public Defender
Charles M. Sevilla, Chief Assistant
State Public Defender

Sheldon Portman, Chairman
California Public Defenders
Association
Santa Clara County Public Defender
111 North Market Street
San Jose, California

Ephraim Margolin
California Attorneys for
Criminal Justice
445 Sutter Street, Suite 501
San Francisco, California

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

NO. 76-1334

* * *

DON BORDENKIRCHER, SUPERINTENDENT, KENTUCKY STATE PENITENTIARY,
Petitioner

V.

PAUL LEWIS HAYES,
Respondent

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

* * *

BRIEF AMICUS CURIAE ON BEHALF OF JIMMY HARRIS, MITCHELL RAY RODGERS AND OTHER TEXAS PRISON INMATES SIMILARLY SITUATED URGING AFFIRMANCE

* * *

STANLEY G. SCHNEIDER,
Staff Counsel for Inmates

RICHARD A. DAWSON,
Staff Counsel for Inmates

P. O. Box 99
Huntsville, Texas 77340
Telephone: (713) 295-6371

Attorneys for Amicus Curiae,
Movants to Appear Pro Hoc Vice

INDEX

INDEX OF AUTHORITIES

IN THE

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* * *

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Petitioner

V.

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* * *

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* * *

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* * *

QUESTIONS PRESENTED

"Whether the Commonwealth's attorney is prohibited from bargaining for a plea of guilty by threatening to bring an additional indictment of an accused does not accept a plea bargain offer?"

"Whether the affirmance of the Sixth Circuit's decision will result in the wholesale release of hundreds of convicted felons in Texas?"

INTEREST OF AMICUS CURIAE

The Staff Counsel for Inmates is an organization sponscred by the Texas Department of Corrections to provide legal representation to indigent prison inmates. The individuals listed below have all requested assistance from the Staff Counsel for the preparation of habeas corpus petitions contesting the validity of their Texas convictions. In each instance, the fact situation is analogous to the facts presented in **Hayes v. Cowan,** 547 F.2d 42 (6th Cir. 1976), cert. granted, **Bordenkircher v. Hayes,** No. 76-1334 (1976). Each of the named individuals, as well as other unknown inmates, would be directly effected by this Court's ruling.

For example, Jimmy Harris, T.D.C. No. 234454, is currently incarcerated in the Ellis Unit of the Texas Department of Corrections serving a life sentence for forgery, enhanced as an habitual criminal, (see Appendix "A" for supporting documentation). Harris was originally indicted in Cause Number B-5811 for the offense of forgery in the 161st Judicial District Court, Ector County, Odessa, Texas. No enhancement allegations were attached to the foregoing indictment. The State's plea offer of eight (8) years, conveyed to Harris by his attorney, Warren Heagy, was rejected on February 23, 1972. Harris was then reindicted in March, 1972. On August 14, 1972, Cause Number B-5811 was dismissed on motion by the State because Harris had been reindicted "as a third offender habitual in Cause Number B-6047;" which alleged the identical forgery charge contained in Cause Number B-5811. On August 21, 1972, W. B. Barnes was appointed to represent Harris, replacing Warren Heagy as his attorney. Harris was tried on October 17, 1972, resulting in his present conviction.

Harris has filed an Application for Writ of Habeas Corpus in the 161st Judicial District Court, Ector County, Texas pursuant to Vernon's Annotated C.C.P. Article 11.07 raising the **Hayes** issue. Upon

exhausting State remedies, Harris Filed an Application for Writ of Habeas Corpus in the United States District Court for the Western District of Texas in Cause Number MO-76-CA-55, which is currently pending before the Honorable D. W. Suttle, United States District Judge.

In another instance, Mitchell Ray Rodgers, T.D.C. No. 248048 is incarcerated in the Ramsey Unit No. 1 of the Texas Department of Corrections serving a life sentence for possession of a controlled substance, to wit: heroin, (see Appendix "B" for supporting documentation). Originally, Rodgers was indicted in Cause Number F-75-566-JH for the felony offense of possession of a controlled substance to wit: heroin. On February 17, 1975, an agreed Motion for Continuance was filed in Cause Number F-75-566-JH signed by Michael L. Morrow and Robert E. Whaley, containing the notation "16 years or reindict as habitual." Mr. Morrow, Rodgers' attorney, has examined his file and confirmed the fact that the Assistant District Attorney indicated that if the defendant did not accept the recommended plea, Rodgers would be reindicted as an habitual criminal. Rodgers was reindicted in Cause Number F-75-2053-JH as an habitual criminal alleging the identical felony offense contained in F-75-566-JH. Rodgers pled not guilty, was convicted by a jury and sentenced to life imprisonment.

Rodgers has not heretofore filed an Application for Writ of Habeas Corpus alleging the question in the instance case.

The vast complexity and importance of the **Hayes** case can best be illustrated by the number of criminal defendants from various metropolitan areas throughout Texas, who have alleged the facts analogous to the **Hayes** situation. Each individual, upon meeting his required burden of proof, would benefit by this Court's affirmance of the Sixth Circuit's decision; listed by counties, the inmates are:

BEXAR —	**Maurice L. Sigard, Lonnie E. Woodard;**
DALLAS —	**Lester S. Chambers, Donald W. DuBose, Ignacio Espinosa, Joe Edward Farley, Jay Hickey, Thomas E. Hill, Jerry Lee Johnson, Jerry Wade Johnson, Rudy O. Juarez, Virgil Lawson, Ronnie W. Lowrance, James L. Mitchell, Robert Montgomery, Billy Joe Norris, Billy J. Roberson, Johnny L. Smith, Roy Thrash, James H. Turner, Bailey Williams, Paul Yarborough;**
ECTOR —	**Daniel C. Cooper, Jimmy Lee Grant;**
EL PASO —	**Eugene Anderson, Francisco Cadena;**
GRAY —	**Robert L. Dunbar;**
HARRIS —	**Jerry Lee Bates, William Browne, Albert C. Dalton, Albert G. Garcia, George G. Gonzales, Harry L. Hawkins, Abron Martin, Delbert L. Plessinger, Samual G. Sanchez, Noel H. Saucier, Clinton L. Shaw;**
HUNT —	**Roland Carroll;**
LUBBOCK —	**Charlie Rodriguez;**
McLENNAN —	**Johnny Lee Robinson;**
NUECES —	**Edward M. Williams;**
POTTER —	**Glenn E. Taylor;**
TARRANT —	**Harvey Mulkey, Abraham R. Saucedo;**
TRAVIS —	**James H. Garcia, Tommy Sloane, Bobby G. Wilson;**
WICHITA —	**Julio Gonzales.**

The foregoing list of inmates indicates that the procedure condemned by the Sixth Circuit is most

frequently practiced in metropolitan areas throughout Texas. Affidavits from some of the attorneys in the foregoing listed counties attest that defendants are often reindicted as habitual criminals for refusing to plead guilty and asserting their right to a jury trial, (see Appendix "C"). Therefore, Amicus supports the affirmance of the Sixth Circuit's decision.

ARGUMENT

"Whether the Commonwealth's attorney is prohibited from bargaining for a plea of guilty by threatening to bring an additional indictment if an accused does not accept a plea bargain offer?"

The Sixth Circuit's decision has been characterized by the Petitioner as undermining plea bargaining, and habitual criminal prosecutions in our criminal justice system and asserts that the decision attacks the orderly administration of "justice." This is not the purpose nor the meaning of the Sixth Circuit's decision.

Rather, the **Hayes'** decision places a legitimate limitation on prosecutorial discretion. The **Hayes'** opinion mandates that absent reasonable justification,[1/] a prosecutor may not use the **threat** of further prosecution to induce a criminal defendant to plead guilty. The defendant's assertation of a **constitutional** right is not sufficient justification to warrant an accused's reindictment which would

---

1/

Several states recognize a prosecutor's right to reindict a defendant with an habitual indictment when it is first discovered that he-she has a prior criminal record. See Arizona, Rules of Criminal Procedure, Rule 13.5; West Ann. California Statutes § 969(a). See also **Blackledge v. Perry,** 417 U.S. 21 (1969); **U.S. v. Jamison,** 505 F.2d 407, 416 (D.C. Cir. 1976).

result in an automatic life sentence upon a jury's finding of guilt.

This Court's decision in **North Carolina v. Pearce,** 395 U.S. 711, (1969) and **Blackledge v. Perry,** 417 U.S. 21 (1974), assures that defendants who assert procedural rights must be treated in a manner which avoids any suggestion of vindictiveness or retaliatory motivations. **Blackledge** emphasized that the prosecution should not be allowed to behave in a manner that even suggests a retaliatory motivation. **Blackledge** has been applied by several circuit courts in situations wherein defendants have asserted procedural or statutory rights. The rights asserted have varied from requests for a mistrial, **United States v. Jamison,** 505 F.2d 407 (D.C. Cir.1974), to being tried by a district judge; **United States v. Ruesga-Martinez,** 534 F.2d 1367 (9th Cir. 1976).

The application of the prophylatic rule established in **Pearce** and **Blackledge** can not be distinguished from the egregious facts presented in the **Hayes** case. Kentucky admits that the only reason Paul Lewis Hayes is presently serving a life sentence is his assertation of rights inherent to our judicial system. Kentucky's only justification for Hayes' reindictment was its desire to save the time and expense accompanying "a needless jury trial." The record clearly reveals the prosecutor's threat and the resulting execution of that threat.

> If the only objective of a state practice is to discourage the assertation of constitutional rights, it is patently unconstitutional. **Chaffin v. Stynchcombe,** 412 U.S. 17, 33 n. 20 (1973); **Shapiro v. Thompson,** 394 U.S. 618, 631 (1969); **U.S. v. Jackson,** 390 U.S. 570, 581.

In **Machibroda v. United States,** 368 U.S. 487, 493 (1962) this Court held:

> A plea of guilty, if induced by promises or threats (of increased charges, acts to) deprive (the plea) of the character of a voluntary act, is void.

This implies a denial of due process when the defendant opts for a jury trial, the State increases the charges and prosecutes. Kentucky attempts to classify its interaction with the accused as "plea bargaining." The applied use of the label "plea bargaining" does not permit the prosecutor to exaggerate the definition of this concept.[2/] As noted by the Sixth Circuit:

> The legitimate purposes of plea bargaining are not served if a prosecutor abuses his powers in order to coerce an unwilling defendant into foregoing his constitutional rights to trial. **Hayes** 547 F.2d at 44.

The record further implies that the only time the habitual criminal statute is applied in an impermissible discriminatory manner is when a criminal defendant insists on his right to a trial by jury and not to those who "trade out" by a plea of guilty. In the case at bar, Kentucky has emphatically stated the reasons for its use of the Habitual Criminal Act. It warns other accused multiple offenders of the consequences of their

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2/

A state may not attempt to justify the deprivation of fundamental constitutional rights by resorting to "mere labels," **NAACP v. Button,** 371 U.S. 415, 429 (1963); **Graham v. Richardson,** 403 U.S. 365, 374 (1971).

asserting constitutional rights.[3] The inevitable effect of the State practice is to discourage the assertation of constitutional rights by penalizing those who choose to exercise them; such a practice must be patently unconstitutional.

Kentucky cannot demonstrate that the reason for the increased charges against an accused after the assertation of a constitutional right is justified either: (1) to promote a compelling State interest, or (2) is rationally related to a legitimate State interest. No viable justification can be proffered by Kentucky for Hayes' reindictment, prosecution and life sentence.

The prophylatic rule of **Pearce** and **Blackledge** has been designed not only to relieve the defendant who has asserted a right from bearing the burden of the State's response, but also to prevent the "chilling exercise of such rights by other defendants who must make their choice under similar circumstances in the future." **United States v. Demarco,** 550 F.2d 1224, 1229 (9th Cir. 1977).

It was not constitutionally permissible for Kentucky to threaten to "up the ante" to discourage Hayes from exercising his right to a jury trial; a

---

3/

Again, Amicus would point out that it is not condemning "plea bargaining" rather, it is the impermissible burden placed on the accused in a threatening manner when the accused asserts a constitutional right. As noted by this Court in **United States v. Jackson,** 390 U.S. 570, 584, (1968):

> A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertation of constitutional rights.

fortiori, it was constitutionally impermissible to follow up the threat with the habitual indictment.

> **"Whether the affirmance of the Sixth Circuit's decision will result in the wholesale release of hundreds of convicted felons in Texas?"**

Contrary to the position of the State of Texas, plea bargaining will not be destroyed and our criminal justice system will not collapse because of the affirmance of the Sixth Circuit's decision. The affirmance also will not open the proverbial "floodgate" to the prison. Indeed, the ultimate ends of justice will be furthered by the enlightened balance between coercion and legitimate plea bargaining which the Sixth Circuit has carefully adopted.

Before a Texas inmate could benefit from the **Hayes'** decision he-she must prove four facts:

1. prior to being indicted as an habitual criminal, he-she was indicted solely on the primary charge;
2. while indicted on the primary offense, the State offered the inmate an opportunity to plead guilty for a specific term of years;
3. after refusing the initial bargain, the prosecutor **threatened** the inmate with reindictment as an habitual criminal;
4. after the inmate's continued refusal to plead guilty, the State reindicted the inmate as an habitual criminal.

All of the foregoing facts must be proved before relief can be granted.

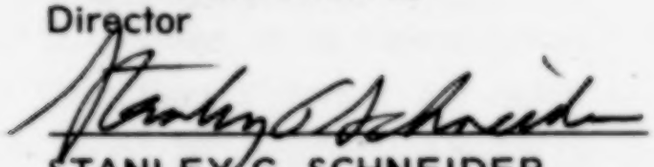
Further, the **Hayes'** decision need not effect the adjudication of guilt but can be limited to abrogating the ultimate sentence. It does not

necessarily follow that reversal of an individual's conviction because of an invalid sentencing procedure will result in an automatic release from prison. On the contrary, Texas law provides for two alternatives to resentence inmates effected by the **Hayes'** decision. First, when the punishment phase of a trial is invalidated and the habitual counts dismissed, the defendant may be retried on the primary charge originally alleged. **Ex Parte Olvera,** 489 S.W.2d 586 (Tex. Crim. App. 1973). A second alternative, practiced in Texas in situations where a sentencing procedure is invalidated by an appellate court ruling, is commutation by the Governor of the individual's sentence for a term of years permitted for the primary charge. The Governor has the constitutional authority to commute an individual's sentence which would render the invalidated sentence a nullity but would result in the upholding of the conviction. **Whan v. State,** 485 S.W.2d (Tex. Crim. App. 1972); **cert. denied,** 411 U.S. 934 (1973); **Rose v. Hodges,** 423 U.S. 19 (1975).

CONCLUSION

For the foregoing reasons, Amicus would urge that this Honorable Court affirm the Sixth Circuit's decision.

Respectfully submitted,
Wm. LOUIS WHITE,
Director



STANLEY G. SCHNEIDER,
RICHARD A. DAWSON,
Staff Counsel for Inmates
P.O. Box 99
Huntsville, Texas 77340
Attorneys for Amicus Curiae,
Movants to Appear Pro Hoc Vice

CERTIFICATE OF SERVICE

I, Stanley G. Schneider, a member of the Staff Counsel for Inmates, on behalf of Amicus Curiae, as Movant to Appear Pro Hoc Vice, enter my appearance in this cause and do hereby certify that true and correct copies of the foregoing Brief of Amicus Curiae on Behalf of Jimmy Harris, Mitchell Ray Rodgers and Other Texas Prison Inmates Similarly Situated Urging Affirmance have been forwarded by United States Mail, postage prepaid, first class, certified, on this the ___ day of August, 1977, addressed as follows:

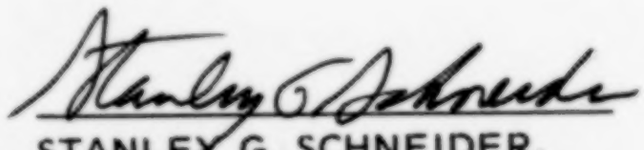
Robert F. Stephens,
Attorney General

Robert L. Chenoweth,
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Counsel for Petitioners

J. Vincent Aprile, II,
Assistant Deputy Public
Defender
Frankfort, Kentucky 40601

Counsel for Respondent



STANLEY G. SCHNEIDER,
Attorney for Amicus Curiae,
Movant to Appear Pro Hoc Vice

APPENDIX "A"

A F F I D A V I T

STATE OF TEXAS)
:
COUNTY OF ECTOR)

My name is Warren Heagy. I am an attorney at law, and practice my profession in Odessa, Ector County, Texas. On the 17th day of February, 1972, I was appointed by Judge C. V. Milburn to represent a defendant by the name of Jimmy Harris in two causes which were pending against him in the 161st Judicial District Court of Ector County, Texas. The cause numbers were #B-5811 and #A-5844. The Defendant, Jimmy Harris, was indicted in Cause No. B-5811 for forgery, and in Cause No. A-5844 for burglary. I do not remember Mr. Harris or any of the circumstances surrounding my representation of him, but at the request of Stanley Schneider, I checked my closed file on the Defendant, Jimmy Harris, and found that I had noted on the outside of the file the following words:

"Bobo == offered 8 years February 23, 1972".

This indicates to me that Jim Bobo, the Assistant District Attorney of Ector County, at that time, had offered Mr. Harris a plea bargain deal wherein he would let the Defendant Harris plead guilty to both charges pending against him for eight years service in the Texas Department of Corrections Institute.

The original indictments for burglary and forgery were not enhanced or habitual, but were for simple burglary and forgery.

As I have previously stated, I honestly cannot remember any of the details of my representation of Mr. Harris, but my file reflects that on June 19, 1972, I wrote the Honorable Judge R. L. McKim a letter stating that the Defendant, Jimmy Harris, had requested that I not represent him in the two causes in which I had been appointed, and I respectfully requested the Court's permission to withdraw from the cases. On the same letter that I wrote to Judge McKim, I received Judge McKim's reply, which was as follows:

> "Sorry, Warren, I can't let the prisoners pick their own lawyers, so you and he will have to patch up your differences.".

Evidently, sometime after June 19, 1972, I was allowed to withdraw from the Defendant Harris' case because it is my understanding that another attorney was appointed for him, and that he was subsequently re-indicted as a

habitual criminal and received a life sentence.

WARREN HEAGY

SUBSCRIBED AND SWORN TO BEFORE ME by the said WARREN HEAGY, on this the 22nd day of April, 1977.

Notary Public, Ector County, Texas
My Commission Expires:

(SEAL)

THE STATE OF TEXAS)
:
COUNTY OF ECTOR)

BEFORE ME, a Notary Public, on this day personally appeared WARREN HEAGY, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND SEAL OF OFFICE this the 22nd day of April, 1977, to certify which, witness my hand and seal of office.

Notary Public, Ector County, Texas
My Commission Expires:

(SEAL)

JOSEPH V. GIBSON, III
ASSOCIATE

W. R. BARNES
ATTORNEY AT LAW
ODESSA, TEXAS 79761

SUITE 810
AMERICAN BANK BLDG.

AREA 915
332-6276

March 4, 1977

Mr. Stanley Schneider
Attorney at Law
Staff Counsel for Inmates
Box 99
Huntsville, Texas 77340

Re: State of Texas vs. Jimmy Harris, Ector County, Texas

Dear Mr. Schneider:

I checked the records at the District Clerk's office after talking with you. The original action filed against Jimmy Harris was cause number B-5,811, in the 161st District Court, Ector County, Texas. On February 17, 1972 the Court appointed Warren Heagy to represent Mr. Harris. Mr. Heagy's address is 217 West 3rd Street, Odessa, Texas. The order of dismissal entered in this cause August 14, 1972, states that it was being dismissed in order to reindict him as a habitual criminal in cause number B-6,047.

Cause number B-6047 was the cause he was actually tried under. I was appointed to represent him August 21, 1972 and trial was on October 17, 1972. The indictment was in March, 1972.

I trust this information will help you. If I can do anything further, please let me know.

Very truly yours,

W. R. Barnes

WRB/vp

3-11-77

Vol. 5
PAGE 117

CAUSE NO. B-5811

THE STATE OF TEXAS — IN THE DISTRICT COURT

VS. — OF ECTOR COUNTY, TEXAS

JIMMY HARRIS — 161ST JUDICIAL DISTRICT

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES JOHN H. GREEN, District Attorney in and for Ector County, Texas, and moves the Court to dismiss the above entitled and numbered criminal action as to the defendant, JIMMY HARRIS, for the reason that the Defendant has been reindicted as a third offender habitual in Cause No. B-6047.

John H. Green
JOHN H. GREEN, DISTRICT ATTORNEY,
ECTOR COUNTY, TEXAS
BY Jim Bob
Assistant District Attorney

ORDER OF DISMISSAL

ON THIS the 10 day of August, 19 72, came on to be heard the motion of the State's Attorney filed herein, as above, asking permission of the Court to dismiss this criminal action as to the defendant, JIMMY HARRIS, which motion having been heard by the Court, and the Court being of the opinion that the reason so stated is good and sufficient to authorize such dismissal;

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by the Court that this criminal action be, and the same is hereby dismissed as to the defendant, JIMMY HARRIS, and that such defendant be discharged.

JUDGE PRESIDING

THE STATE OF TEXAS I

COUNTY OF ECTOR I

I, WANDA McMANN, CLERK of the 161st District Court in and for Ector County, Texas, do hereby certify that the above and foregoing is a true and correct copy of:

Motion to Dismiss and Order of Dismissal

In Cause No. B-5811

Styled The State of Texas

vs. Jimmy Harris

as the same appears from the original now on file and of record in this office.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT at Odessa, Texas, this the 7th day of March, 19 77

WANDA McMANN, District Clerk
Ector County, Texas
By: Paulette Bay
Deputy

APPENDIX "B"

JUL 11 1977

McCULLOCH, McDOWELL & MORROW
ATTORNEYS AND COUNSELORS AT LAW
1025 ELM STREET, SUITE 600
DALLAS, TEXAS 75202

ANDREW McCULLOCH, JR.
SCOTT McDOWELL
MICHAEL L. MORROW

UNITED FIDELITY LIFE BUILDING
AREA CODE 214
742-3030

July 6, 1977

Mr. Stanley Schneider
Staff Counsel for Inmates
P. O. Box 99
Huntsville, Texas 77340

Re: Wesley James Raven
Robbery C[illegible]
Dallas County

Mitchell Ray Rogers
Possession of Heroin Case
Dallas County

Dear Mr. Schneider:

Concerning Wesley James Raven, my case notes show that the Assistant District Attorney made a plea recommendation of 25 years in the penitentiary to me on January 14, 1975. Announcement day on Defendant's cases was January 15, 1975, and a trial date in early February was set. Between these two dates, a reindictment of the aggravated robbery charge with enhancement punishment counts was returned by the Grand Jury on January 27, 1975. My notes do not show whether the Assistant District Attorney indicated the reindictment was because of the Defendant's failure to accept his plea recommendation of 25 years. Normally, I do note such conversations in my file.

Concerning Mitchell Ray Rogers, my case notes indicate that on February 17, 1975, the Assistant District Attorney prosecuting the case indicated that if Defendant did not accept 18 years on a recommended plea, he would be reindicted with enhancement counts making life sentence automatic as an habitual criminal.

Very truly yours,

MICHAEL L. MORROW

MLM/sch

THE STATE OF TEXAS |

COUNTY OF DALLAS |

BEFORE ME, the undersigned authority, on this day personally appeared MICHAEL L. MORROW, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 6th day of July, 1977.

Sandra C Holloway
NOTARY PUBLIC In and for Dallas County, Texas

My Commission Expires:
7/8/77

AFFIDAVIT OF MITCHELL RAY RODGERS

THE STATE OF TEXAS,
COUNTY OF BRAZORIA.

BEFORE ME, the undersigned authority, on this day personally appeared MITCHELL RAY RODGERS, who, being by me duly sworn, upon his oath deposes and says:

"I, MITCHELL RAY RODGERS, TDC #248048, of the Ramsey Unit #1 of the Texas Department of Corrections, Otey CPO Box 1, Rosharon, Brazoria County, Texas, make the following statement and declare the same to be true and correct:

"That, on April 9, 1975, I was convicted, upon a plea of Not Guilty to a jury, of the felony offense of Possession of a Controlled Substance to wit: heroin [habitual] in Cause No. F-75-2053-JH in Criminal District Court No. 1 of Dallas County, Texas, and sentenced to LIFE imprisonment in the Texas Department of Corrections.

"That, on January 27, 1975, I was indicted in Cause No. F-75-566-JH on only the primary offense of Possession of a Controlled Substance to wit: heroin. Through my attorney, Mr. Michael L. Morrow of Dallas, Texas, the Assistant District Attorney offered me a plea bargain of sixteen (16) years in exchange for my guilty plea or threatened to re-indict me as as habitual criminal if I failed to accept this offer. However, I rejected the offer and elected to go to trial on a plea of Not Guilty to the primary offense.

"As a result of my election to go to trial, on February 24, 1975, I was re-indicted as an habitual criminal in Cause No. F-75-2053-JH. As a direct result of the re-indictment, I was compelled to plead Not Guilty and received my LIFE sentence."

Mitchell Ray Rodgers
MITCHELL RAY RODGERS, Affiant.

SWORN TO AND SUBSCRIBED before me by the said MITCHELL RAY RODGERS on this the 03 day of June, 1977, to certify which witness my hand and seal of office.

Randall A Bush

NOTARY PUBLIC in and for
Brazoria County, Texas.

My Commission Expires: August 01, 1978

RANDALL A. BUSH

CRIMINAL DISTRICT COURT
DALLAS COUNTY, TEXAS

THE STATE OF TEXAS

VS. MITCHELL RAY RODGERS [redacted]

No. [redacted]
F75-566-JH
F75-567-JH

AGREED ORDER OF CONTINUANCE

COMES NOW THE DEFENDANT, by and through his attorney of record, and the District Attorney of Dallas County, Texas, and would show the Court as follows:

1. The defendant (IS) ([redacted]) present. Jail

2. The District Attorney, on a plea of guilty, recommends:
16 YRS OR WILL RE-INDICT AS HABITUAL
_____ TDC _____ JAIL

_____ PRO _____ FINE

3. This cause is passed by agreement to 4-1-75 (DATE)

for [illegible] (ANNOUNCEMENT – PLEA – TRIAL – HEARING – INVEST. – DISMISSAL)

4. The defendant's presence at next setting [redacted] (IS NOT) waived. Jail

[illegible] (ASSISTANT DISTRICT ATTORNEY)

Mike Morrow (ATTORNEY FOR DEFENDANT)

_____ (DEFENDANT)

PHONE: 742-3030

Approved by _____ (JUDGE)

Date 17 February 1975

NOTE: Defendant's presence required on ALL dispositive settings.

APPENDIX "C"

STATE OF TEXAS §
COUNTY OF HARRIS §

AFFIDAVIT

BEFORE ME, the undersigned authority, did personally appear LARRY SAUER, affiant, who being duly sworn, deposes as follows:

My name is Larry Sauer, and I am a resident of Harris County, Texas. I have been admitted to practice before the Supreme Court of Texas since April 7, 1971. In the course of my practice, I have had an opportunity to represent several persons, charged with felony offenses. The State offered the defendants a number of years in exchange for my clients' guilty plea. Had clients refused, the State would reindict them as habitual criminals.

It is a common practice in Harris County, Texas. for the State to reindict a defendant as an habitual criminal when he/she refuses to plead guilty and asserts his/her right to a jury trial.

LARRY SAUER, Affiant

SUBSCRIBED AND SWORN TO before me by the said LARRY SAUER, this the 25th day of July, 1977, to certify which witness my hand and seal of office.

Gloria Freschardt
NOTARY PUBLIC IN AND FOR
HARRIS COUNTY, T E X A S

JUL 26 1977

JUL 26 1977

STATE OF TEXAS §
§
COUNTY OF ~~Harris~~ §

AFFIDAVIT

BEFORE ME, the undersigned authority, Carmen Garcia, did personally appear Michael J. Donahue, who after being duly sworn, deposes as follows:

My name is Michael J. Donahue, and I am a resident of Harris County, Texas. I have been admitted to practice before the Supreme Court of Texas since 1975. In the course of my practice, I have had an opportunity to represent L. D. Prodan, charged with the felony offense of Theft. The State offered the defendant 20 years in exchange for my client's guilty plea. My client refused and the State reindicted him/her as an habitual criminal.

It is a common practice in Harris County, Texas for the State to reindict a defendant as an habitual criminal when he/she refuses to plead guilty and asserts his/her right to a jury trial.

Michael J. Donahue
Affiant

STATE OF TEXAS §
§
COUNTY OF _____ §

SUBSCRIBED AND SWORN TO before me by the said Michael J. Donahue, this the 25th day of July, 1977, to certify which witness my hand and seal of office.

Carmen T. García
NOTARY PUBLIC in and for
Harris County, Texas

STATE OF TEXAS §
§
COUNTY OF HARRIS §

AFFIDAVIT

BEFORE ME, the undersigned authority, J. Ronald Kercher, did personally appear DAVID B. ZIEGLER, who after being duly sworn, deposes as follows:

My name is DAVID B. ZIEGLER, and I am a resident of HOUSTON, HARRIS County, Texas. I was admitted to practice before the Supreme Court of Texas in 1972. In the course of my practice, I have had an opportunity to represent HORACE GENE REDFORD, charged with the felony offense of THEFT, 3rd Offender. The State offered the defendant THREE (3) years in exchange for my client's guilty plea. My client refused and the State reindicted him/~~her~~ as an habitual criminal.

It is a common practice in HARRIS County, Texas for the State to reindict a defendant as an habitual criminal when he/she refuses to plead guilty and asserts his/her right to a jury trial.

David B. Ziegler
Affiant

STATE OF TEXAS §
§
COUNTY OF HARRIS §

SUBSCRIBED AND SWORN TO before me by the said DAVID B. ZIEGLER, this the 22nd day of July, 1977, to certify which witness my hand and seal of office.

J. Ronald Kercher
NOTARY PUBLIC in and for
HARRIS COUNTY, T E X A S

STATE OF TEXAS §
COUNTY OF Harris §

AFFIDAVIT

BEFORE ME, the undersigned authority, Marilyn Franklin, did personally appear Michael J. Thibodeaux, who after being duly sworn, deposes as follows:

My name is Michael J. Thibodeaux, and I am a resident of Harris County, Texas. I was admitted to practice before the Supreme Court of Texas in December 19, 1973. In the course of my practice, I have had an opportunity to represent (Court appointed name), charged with the felony offense of Aggravated Robbery. The State offered the defendant 28 years in exchange for my client's guilty plea. My client refused and the State reindicted him/her as an habitual criminal.

It is a common practice in Harris County, Texas for the State to reindict a defendant as an habitual criminal when he/she refuses to plead guilty and asserts his/her right to a jury trial.

Michael J. Thibodeaux
Affiant

STATE OF TEXAS §
§
COUNTY OF _____ §

SUBSCRIBED AND SWORN TO before me by the said Michael J. Thibodeaux, this the 27th day of July, 1977, to certify which witness my hand and seal of office.

Marilyn J. Franklin
NOTARY PUBLIC in and for

STATE OF TEXAS §
COUNTY OF HARRIS §

AFFIDAVIT

BEFORE ME, the undersigned authority, Margaret Hall, did personally appear JAMES R. MORIARTY, who after being duly sworn, deposes as follows:

My name is JAMES R. MORIARTY, and I am a resident of Houston, Harris County, Texas. I was admitted to practice before the Supreme Court of Texas in October, 1976. In the course of my practice, I have had an opportunity to represent Leroy Smith, charged with the felony offense of Theft and Burglary. The State offered the defendant 8 years in exchange for my client's guilty plea. My client refused and the State reindicted him/her as an habitual criminal.

It is a common practice in Harris County, Texas for the State to reindict a defendant as an habitual criminal when he/she refuses to plead guilty and asserts his/her right to a jury trial.

James R. Moriarty
Affiant James R. Moriarty

STATE OF TEXAS §
§
COUNTY OF Harris §

SUBSCRIBED AND SWORN TO before me by the said James R. Moriarty, this the 22 day of July, 1977, to certify which witness my hand and seal of office.

Margaret Hall
NOTARY PUBLIC in and for
Harris County, T E X A S

STATE OF TEXAS !
COUNTY OF Dallas !

AFFIDAVIT

BEFORE ME, the undersigned authority, _____, did personally appear Lindsey Endgrby _____, who after being duly sworn, deposes as follows:

My name is Lindsey Endgrby, and I am a resident of Dallas County, Texas. I was admitted to practice before the Supreme Court of Texas in 1971. In the course of my practice, I have had an opportunity to represent James Oliver Grant, charged with the felony offense of Agg Rob. The State offered the defendant 5 years in exchange for my client's guilty plea. My client refused and the State reindicted him/her as an habitual criminal.

It is a common practice in Dallas County, Texas for the State to reindict a defendant as an habitual criminal when he/she refuses to plead guilty and asserts his/her right to a jury trial.

Lindsey Endgrby
Affiant

STATE OF TEXAS !
COUNTY OF Dallas !

SUBSCRIBED AND SWORN TO before me by the said Lindsey Endgrby, this the 25th day of July, 1977, to certify which witness my hand and seal of office.

Gloria Erickson
NOTARY PUBLIC in and for
GLORIA ERICKSON, Notary Public
and for Dallas County, Texas
My Commission Expires 10/29/77

STATE OF TEXAS !
COUNTY OF DALLAS !

AFFIDAVIT

BEFORE ME, the undersigned authority, Notary Public, _____, did personally appear Chuck Miller _____, who after being duly sworn, deposes as follows:

My name is Chuck Miller, and I am a resident of Dallas County, Texas. I was admitted to practice before the Supreme Court of Texas in 1972. In the course of my practice, I have had an opportunity to represent Willie D. Cary, charged with the felony offense of burglary of a habitation #F75-10074-I. The State offered the defendant 10 years in exchange for my client's guilty plea. My client refused and the State reindicted him/[redacted] as an habitual criminal, and tried him as such.

It is a common practice in Dallas County, Texas for the State to reindict a defendant as an habitual criminal when he/[redacted] refuses to plead guilty and asserts his/[redacted] right to a jury trial.

Affiant

STATE OF TEXAS !
COUNTY OF Dallas !

SUBSCRIBED AND SWORN TO before me by the said Chuck Miller, this the 26th day of July, 1977, to certify which witness my hand and seal of office.

NOTARY PUBLIC in and for
Dallas County, Texas

STATE OF TEXAS §
COUNTY OF Dallas §

JUL 28 1977

AFFIDAVIT

BEFORE ME, the undersigned authority, _____, did personally appear Richard Alan Anderson, who after being duly sworn, deposes as follows:

My name is Richard Alan Anderson, and I am a resident of Dallas, Dallas County, Texas. I was admitted to practice before the Supreme Court of Texas in September, 1978. In the course of my practice, I have had an opportunity to represent Carolyn Robertson, charged with the felony offense of Aggravated Robbery. The State offered the defendant 5 years in exchange for my client's guilty plea. My client refused and the State reindicted ~~him~~/her as an habitual criminal.

It is a common practice in Dallas County, Texas for the State to reindict a defendant as an habitual criminal when he/she refuses to plead guilty and asserts his/her right to a jury trial.

Richard Alan Anderson
Affiant

STATE OF TEXAS §
COUNTY OF Dallas §

SUBSCRIBED AND SWORN TO before me by the said Anderson, this the 27th day of July, 1977, to certify which witness my hand and seal of office.

Gloria Erickson
NOTARY PUBLIC in and for
GLORIA ERICKSON, Notary Public
In and for Dallas County, Texas
My Commission Expires 10/29/79

AFFIDAVIT

BEFORE ME, the undersigned authority, a Notary Public in and for Harris County, Texas, did personally appear Mary O. Teague, who after being duly sworn, deposes as follows:

My name is Mary O. Teague, and I am a resident of Houston, Harris County, Texas. I was admitted to practice before the Supreme Court of Texas in 1961. In the course of my practice, I have had an opportunity to represent _____, charged with the felony offense of _____. The State offered the defendant _____ years in exchange for my client's guilty plea. My client refused and the State reindicted him/her as an habitual criminal.

It is ~~a common~~ practice in Harris County, Texas for the State to reindict a defendant as an habitual criminal when he/she refuses to plead guilty and asserts his/her right to a jury trial.

Mary O. Teague
Affiant

STATE OF TEXAS §
COUNTY OF HARRIS §

SUBSCRIBED AND SWORN TO before me by the said Mary O. Teague, this the 28th day of July, 1977, to certify which witness my hand and seal of office.

Neal D. Lawrence, Jr.
NOTARY PUBLIC in and for
Harris County, Texas

AUG 0 1 1977

STATE OF TEXAS §
COUNTY OF HARRIS §

AFFIDAVIT

BEFORE ME, the undersigned authority, a Notary Public in and for Harris County, Texas did personally appear DAVID K. BIKES, who after being duly sworn, deposes as follows:

My name is DAVID K. BIKES, and I am a resident of HARRIS County, Texas. I was admitted to practice before the Supreme Court of Texas in SEPTEMBER 1971. In the course of my practice, I have had an opportunity to represent _____, charged with the felony offense of _____. The State offered the defendant _____ years in exchange for my client's guilty plea. My client refused and the State reindicted him/her as an habitual criminal.

It is a common practice in HARRIS County, Texas for the State to reindict a defendant as an habitual criminal when he/she refuses to plead guilty and asserts his/her right to a jury trial.

David K. Bikes
Affiant

STATE OF TEXAS §
COUNTY OF Harris §

SUBSCRIBED AND SWORN TO before me by the said David K. Bikes, this the 29th day of July, 1977, to certify which witness my hand and seal of office.

Neal D. Cannon Jr.
NOTARY PUBLIC in and for

STATE OF TEXAS §
COUNTY OF HARRIS §

AFFIDAVIT

BEFORE ME, the undersigned authority, A Notary Public in and for Harris County, Texas, did personally appear Neal D. Cannon, Jr., who after being duly sworn, deposes as follows:

My name is Neal D. Cannon, Jr., and I am a resident of Houston, Harris County, Texas. I was admitted to practice before the Supreme Court of Texas in 1965. In the course of my practice, I have had an opportunity to represent _____, charged with the felony offense of _____. The State offered the defendant _____ years in exchange for my client's guilty plea. My client refused and the State reindicted him/her as an habitual criminal.

It is not an unusual practice in Harris County, Texas for the State to reindict a defendant as an habitual criminal when he/she refuses to plead guilty and asserts his/her right to a jury trial.

Neal D. Cannon Jr.
Affiant

STATE OF TEXAS §
COUNTY OF HARRIS §

SUBSCRIBED AND SWORN TO before me by the said Neal D. Cannon, Jr., this the 29th day of July, 1977, to certify which witness my hand and seal of office.

Mary L. Weinhart
NOTARY PUBLIC in and for
Harris County, Texas

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

NO. 76-1334

* * *

DON BORDENKIRCHER, SUPERINTENDENT, KENTUCKY STATE PENITENTIARY,
Petitioner

V.

PAUL LEWIS HAYES,
Respondent

* * *

On Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

* * *

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL, JR.
Assistant Attorney General
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Telephone: (512) 475-3281

Attorneys for Amicus Curiae,
State of Texas

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

NO. 76-1334

* * *

DON BORDENKIRCHER, SUPERINTENDENT,
KENTUCKY STATE PENITENTIARY,
Petitioner

V.

PAUL LEWIS HAYES,
Respondent

* * *

On Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

* * *

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

* * *

INTEREST OF AMICUS CURIAE

The State of Texas files this amicus brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. The People of the State of Texas have a vital interest in the question presented on the grant of certiorari in this case, that is, whether the use of an enhanced indictment by the state against a defendant

who refuses to plead guilty to the primary offense is unconstitutional.

For the reasons set forth below, the State of Texas will be affected by the ultimate disposition of the question presented for review before this Honorable Court in the above entitled matter.

The question now before this Honorable Court has been presented on substantially the same facts to the federal courts of the State of Texas. The United States Court of Appeals for the Fifth Circuit handed down an opinion on February 25, 1977, denying relief to a state prisoner who had alleged substantially the same facts as Respondent. *Montgomery v. Estelle*, No. 76-2636 (5th Cir. Feb. 25, 1977) (opinion attached as Appendix A). A Motion for Rehearing *En Banc* was denied and the mandate issued on April 14, 1977. On May 2, 1977, that court issued a new order *sua sponte* withdrawing the opinion, vacating the mandate, and setting *Montgomery v. Estelle* for oral argument. A copy of that order is attached as Appendix B.

In addition to *Montgomery*, there are several other cases pending in the federal courts in Texas on the same issue. Several hundred inmates of the Texas Department of Corrections will ultimately be affected by this Court's decision on this issue.

ARGUMENT AND AUTHORITIES

The use of habitual indictment during plea bargaining does not offend constitutional due process and equal protection.

The opinion of the United States Court of Appeals for the Sixth Circuit contends that the use of habitual indictment against one who asserts his right to trial is a vindictive tactic by the prosecutor. This theory is contra

to the holding of this Court in *Oyler v. Boles*, 368 U.S. 448 (1962). There, it was held that a state may exercise selectivity in the enforcement of its habitual criminal statutes without violating the Constitution unless the selectivity is based on an unjustifiable standard such as race, religion or similar arbitrary classification. *Oyler v. Boles*, 368 U.S. at 456.

The United States Court of Appeals for the Fifth Circuit has adopted this reasoning in dealing with this issue in previous cases. In *Martinez v. Estelle*, 527 F.2d 1330 (5th Cir. 1976), that court held that the defendant's life sentence was the result of trial strategy rather than prosecutorial vindictiveness. In denying relief, that court quoted from its earlier opinion in *Arechiga v. State of Texas*, 469 F.2d 646 (5th Cir. 1972):

> It was Perales (the defendant), not the prosecuting attorney, who chose to proceed with the trial before a jury and forego the guarantee that the enhancement statute would not be invoked. Once petitioner rejected the state's offer, the state was free to proceed as it would in the trial of any other convicted felon and make full use of the enhancement statute. Under these circumstances we conclude that the state did not act vindictively and that petitioner's contention in this regard is therefore without merit.

Arechiga v. State of Texas, 469 F.2d 646, 647 (5th Cir. 1972).

See also In Re Breen's Petition, 237 F.Supp. 575 (S.D. Tex. 1964), *aff'd* 341 F.2d 96 (5th Cir. 1965), *cert. denied*, 386 U.S. 926 (1967).

In the case at bar Respondent Hayes had been twice before convicted of felonies. The law of the State of Kentucky, like that of the State of Texas, required a life sentence for one who is convicted of a felony after having been twice before convicted of felony offenses. The prosecutor made an offer of leniency to Respondent in exchange for a plea of guilty. Respondent instead chose to exercise his right to trial. If he had been found not guilty of the primary offense, he would have been free. If he had shown a defect in his earlier conviction, he would not have been subject to a life sentence. Respondent chose to reject the offer of a 5 year sentence and as a result of the conviction received a life sentence.

This presents no different situation in tactics than a choice by a defendant to forego a prosecutor's offer of lesser number of years than the maximum on any offense. Once that offer is rejected, the prosecutor may proceed as if there were no offer and seek the maximum punishment for the offense.

The prosecutor's discretion in offering a plea bargain is a basic element of the criminal justice system and is encouraged. *Santobello v. New York*, 404 U.S. 257 (1971). A holding that a prosecutor may never seek the maximum punishment after a defendant has rejected his offer would not only destroy the plea bargaining process but would bring into court every inmate who asserted his right to trial after being offered punishment less than the maximum in exchange for a plea of guilty.

In order to allow a sentence for a term of years less than life, the defendant cannot be convicted under an enhanced indictment. Therefore, he must be indicted without alleging any prior offense, or if the indictment alleges prior offenses, that portion must be dismissed. If

a plea of guilty is entered on an enhanced indictment, the only possible punishment is life imprisonment.

In order to attain a habitual indictment Texas, like most other jurisdictions, must present the grand jury proof of the commission and conviction of the prior offenses. The necessary proof is not generally available to the prosecution at the time the original indictment is presented. Further, if the prosecutor intends to offer a term of years in exchange for a plea of guilty the bargaining and plea itself can proceed more expediciously if an indictment on the primary offense only is initially sought.

The state has a legitimate law enforcement interest in offering leniency in exchange for a plea of guilty. The first step toward rehabilitation is the affirmative action of a defendant coming forward and admitting his guilt. It has been held that:

> Although a heavier sentence for one who has been convicted after trial and a lighter sentence for one who pleads guilty are in a sense two sides to the same coin, it is within proper bounds for the court to preserve some leeway so that it is able to extend the leniency in consideration of the cooperation and at least superficial penitence evidence by one who pleads guilty.

United States v. Wilson, 506 F.2d 1252, 1259-1260 (7th Cir. 1974).

It is often in the best interest of justice and society to offer the defendant a lesser sentence in exchange for a plea of guilty. A sentence less than life gives the defendant a better opportunity to begin rehabilitation. If the defendant has been twice before convicted, he faces a mandatory life sentence. When a defendant

makes an indication of penitence by expressing regrets for his action and desires to plead guilty, the prosecutor may show him leniency by securing a lesser indictment or dismissing the enhancement portion of the indictment.

The use of a life sentence as leverage for bargaining has been sanctioned. Mr. Justice Marshall, concurring in *Furman v. Georgia*, 408 U.S. 238 (1972), stated:

> If the death penalty is used to encourage guilty pleas and thus to deter suspects from exercising their rights under the Sixth Amendment to jury trials, it is unconstitutional. *United States v. Jackson*, 390 U.S. 570 (1968). Its elimination would do little to impair the state's bargaining position in criminal cases, since life imprisonment remains a severe sanction which can be used as leverage for bargaining for pleas or confessions in exchange for either charges of lesser offenses or recommendations of leniency.

408 U.S. at 355-56.

CONCLUSION

To uphold the decision of the Court of Appeals would auger the complete demise of plea bargaining. The criminal justice system, already stymied by an overly burdensome case load, would collapse under the pressure of trial on each case without plea bargaining. It is a pragmatism of today's society that a prosecutor must be allowed a certain amount of discretion in plea bargaining. To hold otherwise would be to ignore the possibility that some defendants are deserving of offers of leniency and would force the prosecutor to seek the maximum indictment without plea bargaining in every case. The mandate of the Fourteenth Amendment and

the Bill of Rights is not to prohibit the practice of accepting pleas to lesser included offenses under any circumstances. To render the actions of the prosecutor in the case at bar unconstitutional would be to put into jeopardy the human values and principles the Constitution was meant to preserve. Therefore, for all of the reasons outlined above, Amicus respectfully submits that this Honorable Court reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL, JR.
Assistant Attorney General
Chief, Enforcement Division

ANITA ASHTON
Asssistant Attorney General

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Telephone: (512) 475-3281

Attorneys for Amicus Curiae,
State of Texas

CERTIFICATE OF SERVICE

I, Anita Ashton, Assistant Attorney General of the State of Texas, and a member of the Bar of the Supreme Court of the United States, now enter my appearance in

this cause on behalf of Amicus Curiae, State of Texas, and do hereby certify that three (3) copies of the foregoing Brief of Amicus Curiae in Support of Petitioner have been served by placing same in the United States mail, first class, postage prepaid, certified, return receipt requested, on this the ____ day of July, 1977, addressed as follows:

Robert F. Stephens
Attorney General

Robert L. Chenoweth
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Counsel for Petitioners

J. Vincent Aprile II
Assistant Deputy Public
Defender
Frankfort, Kentucky 40601

Counsel for Respondent

ANITA ASHTON
Assistant Attorney General

APPENDIX A

MONTGOMERY v. ESTELLE

Robert Floyd MONTGOMERY,
Petitioner-Appellant,

v.

W. J. ESTELLE, Jr., Director, Texas
Respondent-Appellee.

NO. 76-2636
Summary Calendar*

United States Court of Appeals,
Fifth Circuit.

Feb. 25, 1977.

Appeal from the United States District Court for the Northern District of Texas.

Before GODBOLD, HILL and FAY, Circuit Judges.

PER CURIAM:

Robert Floyd Montgomery, a prisoner of the State of Texas, appeals from the district court's denial of his petition for the writ of habeas corpus, without an evidentiary hearing. We affirm.

Appellant was convicted in a Texas state court of selling narcotics, with two prior convictions alleged for enhancement of sentence. The jury found him guilty of the principal and enhancement counts, whereupon he received a mandatory life sentence as provided by

*Rule 18, 5 Cir.; see *Isbell Enterprises v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970. 431 F.2d 409, Part I.

former Art. 63 of the Texas Penal Code. On direct appeal the judgment was affirmed. *Montgomery v. State*, Tex.Cr.App.1974, 506 S.W.2d 623.

[1,2] Having exhausted his state remedies, appellant petitioned the United States District Court for habeas corpus relief. He alleged that the state prosecutor had deprived him of due process, equal protection, and Fifth and Sixth Amendment rights by prosecuting him as a multiple offender because he refused to plead guilty and forego his right to a jury trial. In support appellant cited *Hardin v. Briscoe*, 5 Cir., 1974, 504 F.2d 885. In that case, which presented the same issue, we held that the district court erred in dismissing the petition for failure to comply with an interlocutory order, and we remanded the case for a judicial determination of the merits of the claim.

In the case *sub judice*, the district court denied habeas relief on the merits, holding that appellant has no right to object to the prosecutor's utilization of the plea bargaining process. We so held, on similar facts, in *Breen v. Beto*, 5 Cir. 1965, 341 F.2d 96, cert. denied, 386 U.S. 926, 87 S.Ct. 867, 17 L.Ed.2d 798 (1967), affirming *In re Breen's Petition*, S.D. Tex.1964, 237 F.Supp. 575. We applied similar reasoning in *Martinez v. Estelle*, 5 Cir. 1976, 527 F.2d 1330, and *Arechiga v. State of Texas*, 5 Cir. 1972, 469 F.2d 646.

In the case *sub judice*, as in the cases cited in the foregoing paragraph, the prosecutor made an offer of mercy to appellant. When he refused the offer, he was tried on the enhanced indictment. It was the appellant who placed himself in jeopardy of the life sentence. As the district court observed, to hold otherwise would mean that in all cases involving a previously convicted defendant, the state would be required to seek the maximum penalty and never could engage in plea

bargaining. Such a ruling would be contrary to the doctrine that plea bargaining is an essential procedure in the administration of justice in the United States. See *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). We find no error in the judgment appealed from, which is hereby affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 76-2636

ROBERT FLOYD MONTGOMERY

Petitioners-Appellant,

versus

W. J. ESTELLE, Director,
Texas Department of Corrections,

Respondent-Appellee

- - - - - -

Appeal from the United States District Court for the
Northern District of Texas

- - - - - -

Before GODBOLD, HILL AND FAY, Circuit Judges.

PER CURIAM:

The mandate of this court issued on April 14, 1977 is

hereby recalled. The opinion entered on February 25, 1977 and order denying rehearing entered on April 6, 1977 are vacated and withdrawn. The Clerk is instructed to schedule this case for oral argument as a Class III.